Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EASTERN MINERALS INTERNATIONAL, INC., MARTIN P. DUFFY, Administrator of the Estates of Wilson W. Wyatt, Sr., and Anne D. Wyatt, WILSON W. WYATT, JR., MARY ANNE WYATT, NANCY WYATT ZORN, VAN BUREN MINERALS CORP., AND MILTON J. BERNOS, JR.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a case seeking just compensation for categorical regulatory takings of real property interests:

1. When the holder of a renewable lease proves that seeking a permit became futile before the right to renew the lease expired, can the holder recover for a taking of the remaining lease term and the right to renew?

2. Can the holders of a royalty interest in minerals, which is of unlimited duration, recover for a taking of that interest when it is shown that seeking a permit became futile, and also that a final decision denying a permit later was issued?

3. When a federal agency uses unfair and protracted procedures to prevent the use of property, including failing to issue in writing a decision it has reached to deny a permit, can affected property owners recover for a taking?

4. What standards should a federal appellate court follow when reviewing a trial court's factual findings on extraordinary delay and other issues in a regulatory takings case?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding in the United States Court of Appeals for the Federal Circuit are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Eastern Minerals International, Inc., and Van Buren Minerals Corp. have no parent corporations, and no publicly held corporation owns 10% or more of either's stock.

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PETITION FOR A WRIT OF CERTIORARI

Eastern Minerals International, Inc. ("Eastern"); Martin P. Duffy, Administrator of the Estates of Wilson W. Wyatt, Sr., and Anne D. Wyatt; Wilson W. Wyatt, Jr.; Mary Anne Wyatt; Nancy Wyatt Zorn; Van Buren Minerals Corp. ("Van Buren") ; and Milton J. Bernos, Jr., respectfully petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-15a)[1] is reported at 271 F.3d 1090 (CA Fed. 2001). The two opinions of the United States Court of Federal Claims (App. 16a-50a) which were appealed are reported at 36 Fed.Cl. 541 (1996), and 39 Fed.Cl. 621 (1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on November 19, 2001 (App. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." The provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.*, relevant to this petition are reprinted in the Appendix at 52a-54a.

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[1] "App." references are to Appendices A to G, *infra*, pp. 1a-56a. "JA" references are to the Joint Appendix filed in the Court of Appeals. "Tr." references, when used, are to trial transcript references on certain pages of the Joint Appendix. Petitioners have requested that the Clerk of the Court of Appeals send one copy of the Joint Appendix to this Court for lodging.

STATEMENT OF THE CASE

A. *Introduction and Summary.* Eastern had a twelve-year renewable coal mining lease, and the Wyatts had a 3.5% coal royalty interest. Eastern received two permits, under which it spent large sums to prepare the property for mining, and applied for a renewal permit in 1982. Although there were no changes in applicable law, there was a change in governmental policy, and no renewal permit ever was granted (JA 1475). As a result of respondent's failure to issue a permit, both Eastern's lease and the Wyatts' royalty interest were rendered worthless.

The trial court found that Eastern's permit application became futile because the Interior Department never would have granted a permit, and also that there was intentional and extraordinary delay. It found that there was a taking by August 1990, before Eastern's right to renew its lease expired, and eight years after Eastern first applied for a renewal permit. The Trial Court awarded both Eastern and the Wyatts compensation for categorical takings. The Federal Circuit reversed both judgments. It *sua sponte* held that Eastern could not recover for the renewable portion of its lease even if it showed that seeking a permit was futile before the right to renew expired. That Court failed to follow or apply the rule that an agency cannot use unfair or repetitive procedures to avoid a final decision. The Court of Appeals did not follow or cite several applicable decisions of this Court; engaged in an unrestricted review of the facts instead of deferring to the Trial Court's findings; and summarily reversed the judgment for the Wyatts without discussing it.

B. *Facts.* In 1953 Anne D. Wyatt and Wilson W. Wyatt, Sr. ("Wyatts") bought about 10,000 acres of land in Tennessee for investment purposes. Some of it adjoins Falls Creek Falls State Park ("Park"). In 1975 Milton J. Bernos, Jr., contracted to buy the property from the Wyatts on an installment basis (App. 16a, 4a; JA 1018, 1479). In 1979, after Bernos confirmed that the property contained valuable coal reserves, a three-way sale-leaseback transaction was completed. Cane Tennessee, Inc. ("Cane") purchased the property from the Wyatts for about $5.1

million, subject to the retention by the Wyatts of a 3.5% royalty interest in any future mined coal. Cane simultaneously leased the property to Eastern, a corporation which Bernos formed. The lease was for a 12-year term, and Eastern had the option to renew the lease for additional 10 year terms (App. 33a, JA 76-77 (Tr. 452-53)). To renew the lease, Eastern had to exercise its option by about August 31, 1990, '80 days before lease termination, and incur a several million dollar obligation (App. 5a; JA 84 (Tr. 495-96); JA 959-60, 954, 953). A consulting firm retained by Cane estimated that Bernos would make between $55 and $69 million mining the property (JA 1030-31, 151 (Tr. 888)).[2]

In 1977 Congress enacted the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 et seq. (1988) ("SMCRA"), which requires a permit to mine coal. *Id.* § 1256(a). SMCRA could be enforced by either the Interior Department's Office of Surface Mining ("OSM") or a State agency. *Id.* §§ 1253-54, 1211. SMCRA provides that if the enforcing agency finds that a mine would "adversely affect" a state Park, a State agency could veto a permit by objecting. *Id.* § 1272(e)(3).

In 1979 Eastern applied to an agency of the State of Tennessee, which then was administering SMCRA, for a permit to disturb 33 surface acres to deep mine coal. The State issued a one-year permit in 1980, and another one-year permit in 1981. Both times the State determined that the proposed mine would comply with all SMCRA requirements, including the "adversely affect" a park provision (App. 5a, JA 21-22 (Tr. 125-30)). Under these permits, Eastern spent large sums to dig a box cut

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[2] In 1979 there was another sale-leaseback transaction in which petitioner Van Buren acquired a separate coal lease (App. 17a). The Trial Court dismissed Van Buren's claims as unripe, and the Federal Circuit declined to review that ruling, holding that the issue was moot in light of its other rulings (App. 23a, 2a-3a). Van Buren petitions for certiorari to keep its claims alive in the event certiorari is granted and the judgment below is reversed. The Van Buren lease is not further addressed in this petition.

(a large excavation enabling vehicular access to the deep coal seam), and develop other infrastructure for mining (App. 17a, JA 85-86 (Tr. 504-08)).

In 1982 Eastern was ready to begin mining coal, and applied for a renewal permit (JA 1425, 1431). There were no changes in the "adversely affect" provisions of SMCRA or implementing regulations (JA 254 (Tr. 1489)). The State denied the application, and ordered Eastern to reclaim the property, which would require filling in the box cut, at its expense (JA 1183-84). Thereafter the State, acting as OSM's agent,[3] agreed that Eastern could submit another application to OSM, which was about to take over the enforcement of SMCRA, and that reclamation would be stayed until the final outcome of the permit application (JA 1186-87).

In October 1984 Eastern submitted its application to OSM, which then began a technical review of it (JA 1432; App. 6a). The sole issue OSM considered from 1984 on was whether Eastern's mine would "adversely affect" the Park (JA 605-06, 609, 626-27, 718, 747-48). In June 1985 Eastern submitted added information in response to a Technical Deficiency Letter ("TDL") issued by OSM (JA 577-80, 589-99). After reviewing this submission, an OSM official acknowledged that he had no "strong defense" to Eastern's response, and that OSM officials might have to "hang our hats" elsewhere (App. 35a and n.3; JA 602).

In August 1985, OSM *completed* its technical review, and tentatively decided to *grant* a permit (JA 1194, 28 (Tr. 166), 25 (Tr.145)).[4] Before Eastern could be informed of that decision,

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[3] *See Bernos Coal Co. v. Lujan,* 739 F.Supp. 1133, 1135-37 (E.D.Tenn. 1990).

[4] An August 9, 1985 OSM memorandum stated that Eastern's application was anticipated to "be in order for permit issuance by November 1, 1985," and requested section 510(c) findings (JA 1194). Section 510(c) findings, which address (fn. continued next page)

a high ranking State official wrote a letter opposing a permit (JA 1195-98). Then, instead of granting a permit, OSM wrote Eastern that its application would involve "great expense," (JA 605). In December 1985 OSM issued a second TDL, which requested voluminous hydrologic information (JA 609-15). At all relevant times State agencies opposed allowing Eastern to mine anywhere on its property (App. 34a-35a and n. 2; JA 19-20 (Tr. 108-10, 114-17); JA 58-59 (Tr. 347-353); JA 1195-98).[5] This meant that, if OSM made an "adversely affect" finding, it would deny a permit.

Eastern learned that it would cost about $250,000.00 to obtain the information OSM requested (JA 138 (Tr. 808)), and Bernos was running out of money. In January, 1986, Eastern applied to OSM's Small Operator Assistance Program ("SOAP") so it would pay for the studies necessary to answer the TDL (JA 616, 46-48 (Tr. 277, 281, 287)). OSM's SOAP office granted the application (JA 54 (Tr. 323)) and was required to collect the information at government expense (30 U.S.C. §1257(c); JA 273 (Tr. 1600); JA 51 (Tr. 309)). However, after the SOAP application was approved, OSM's SOAP office paid for no studies because OSM's permitting office decided to deny a permit without receiving further information (JA 48 (Tr. 288)). In July 1986, OSM's permitting office denied the application based on "noise" (JA 626), a ground OSM never mentioned as a deficiency in its TDL, and not addressed in OSM's permitting regulations (JA 609-15, 268, 161 (Tr. 1571, 938-39)). The denial letter also noted the

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(fn. continued) legal matters such as bonds, are made after the technical review is completed, and OSM concludes that a permit should issue (JA 25, 28, 35 (Tr. 144-45, 166, 206-07); *see* App. 6a). Section 510(c) findings are not sought when the technical review leads to a decision to deny a permit, since there is nothing to bond.

[5] The Tennessee Wildlife Resources Agency wanted to insure that all of Eastern's property would be available for wild turkey hunting by the public (JA 58, 59 (Tr. 349, 357)).

"strong potential" for adverse hydrologic consequences, but did not make a definite finding on this point (JA 626).

In June 1987, on Eastern's appeal to an Administrative Law Judge ("ALJ"), OSM agreed to render a complete decision on adverse impact, and the ALJ told OSM to inform Eastern "immediately" of any additional information it needed to supply so OSM could make the decision (JA 661-662). The ALJ also stated that OSM would be acting in "bad faith" if it sought reclamation while the permit application was pending (JA 676). In February 1988 OSM reissued to Eastern essentially the same TDL it had sent out in December 1985 (JA 1291, 42 (Tr. 251-52)). Eastern reapplied to OSM's SOAP office, and its SOAP application was again approved (JA 48 (Tr. 289-90)).

In 1988 and 1989 OSM put the SOAP effort on "hold" three times. An internal OSM memorandum stated that the agency wanted to "tak[e] the pressure off" of it caused by Eastern's "aggressive pursuit of SOAP monies" (JA 725). First, in May 1988, OSM put SOAP on hold for failure to reclaim the box-cut (JA 725, 49 (Tr. 293)). This was inconsistent with the 1984 agreed order staying reclamation, and after the ALJ stated that seeking reclamation would constitute "bad faith" (JA 1187, 676). In September 1988 OSM put SOAP on hold again because OSM's permitting office, which earlier had issued TDLs alleging there were "numerous deficiencies" in Eastern's hydrologic data, now was "unsure" whether a SOAP study would be "worth the expense" (JA 49 (Tr. 293)). OSM put the SOAP effort on hold a third time in May 1989, based again, in part, on Eastern's failure to reclaim (JA 1333-35, 49-50 (Tr. 294-298)). In July 1989, after Eastern overcame that objection (JA 1337), OSM's SOAP office commissioned a report by Challenge consultants to provide the information to satisfy the TDL (JA 50 (Tr. 298-300)). Challenge did everything OSM requested (JA 50 (Tr. 301)), and its report found no problems with the projected mine (JA 83 (Tr. 492-93)). However, OSM did not grant a permit (JA 298 (Tr. 1736-37); App. 7a-8a).

Instead, in the summer of 1990, an OSM official prepared a "confidential" plan proposing numerous information gathering steps, which would take an extended time to complete (JA 1391-96; JA 50 (Tr. 301-02)). On August 3, 1990 OSM abandoned the existing SOAP plan and created a new plan involving several phases (JA 1398-1400; JA 50-51 (Tr. 300-04)). At each stage of these plans, if the result was favorable to Eastern OSM would not grant a permit. Instead, it would go on to the next step of the plan (JA 1392-95, 1399, 50 (Tr. 302-03)).

Before August, 1990, Bernos informed OSM several times of the looming lease expiration and the need for action (JA 46 (Tr. 278)), but OSM issued no decision. Eastern did not exercise its renewal option at the end of August 1990, and the lease thus technically expired at the end of February 1991. Thereafter, Eastern remained in possession as a holdover tenant, with Cane's acquiescence, until about May 1993, when Eastern and Cane executed an agreement formally terminating the lease (JA 84 (Tr. 496-98)). Eastern continued to pursue a permit after the lease expired because it believed that it could persuade Cane to re-lease the property if a permit was obtained (*id; see* App. 18a).

In January 1992, OSM decided that it did not need any more SOAP studies after all, and to deny a permit on the merits (JA 42-43, 51 (Tr. 255-56, 307)). After Bernos complained to the ALJ about that prospective decision (JA 1415-16), OSM reversed course again and did not deny the permit. Instead it waited 18 more months and then sent out essentially the same TDL it had issued twice earlier (JA 747-61, 42 (Tr. 251-52)). OSM's permitting office sent the TDL to Eastern, instead of to OSM's SOAP office which was responsible for obtaining the data, so the permitting office could deny Eastern's application for failing to respond to the TDL, instead of on its merits (JA 304 (Tr. 1777)). In 1994, with SOAP not having conducted any additional studies, OSM denied a permit. The denial was not based on an "adversely affect" finding, but because Eastern failed to respond to the TDL which was SOAP's responsibility (JA 764).

In 1991 the Wyatts conveyed their 3.5% royalty interest to their children, who retain it today (App. 22a; JA 767). From start to finish, Bernos and Eastern lost $3.8 million on this venture (JA 1475, 85-86 (Tr. 504, 509)).

C. *Trial Court Decision.* In December 1994, petitioners brought a regulatory takings suit against respondent in the United States Court of Federal Claims ("Trial Court") (JA 765). That Court had jurisdiction under 28 U.S.C. § 1491(a)(1).

After a 12 day trial (JA 924-25), the Trial Court (per Judge Hodges) made findings that by early August 1990 Eastern's attempt to obtain a permit became futile, and that OSM's delay was intentional and extraordinary. The Trial Court made these findings relevant to futility: that OSM "had no intention of ever granting the permit," (App. 28a) and "never would have granted the permit" (App. 34a); that "it was clear that OSM . . . had no intention of allowing mining next to the park" (App. 37a); and that "OSM's policy was to stop Eastern's development without taking a final action that plaintiff could appeal" (App. 36a). The Trial Court also found that proposals to mine on other portions of Eastern's property "would have been denied by OSM," and that "Eastern's claim is ripe for adjudication" (App. 22a-23a).

On the question of delay, the Trial Court found that OSM "waged a war of attrition against Eastern" (App. 36a); that OSM delayed consideration of the application for "an extraordinary length of time" (App. 28a); that "the delay became unreasonable" by early August 1990 (App. 37a, 36a; JA 1397-1400); and that the government "destroyed the fruits of [plaintiffs'] investments by purposely delaying action on plaintiffs' [permit] application until after their lease expired" (App. 32a).

The Trial Court also found that Eastern did not extend its lease at the end of August 1990 because it correctly believed "OSM never would have granted the permit" (App. 34a); that Eastern "could not afford to retain an expensive leasehold when it knew that state and federal authorities would never renew its permit" (App. 36a); and that OSM "prevented Eastern both from

obtaining the benefit of its leasehold interest and from renewing its lease" (App. 38a).

The Trial Court further found that OSM's extraordinary delay made both Eastern's lease and the Wyatts' royalty interest "valueless" (App. 31a), and determined that the takings were permanent (App. 37a-38a). Relying upon *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), the Trial Court determined that Eastern was entitled to recover for the value of both its remaining lease term (which extended to February 1991) and its right to renew for additional ten-year terms (App. 38a-39a). It ultimately entered a judgment for Eastern for $9,961,393.00, and the Wyatts for $3,743,766.00, both with compound interest (App. 51a).

D. *Appellate Decision.* In a decision issued more that 20 months after oral argument (App. 1a, 55a), the Federal Circuit reversed. Judge Gajarsa wrote for himself and Judges Newman and Bryson. The Federal Circuit *sua sponte* ruled that Eastern could not recover for a permanent taking because it did not have a property interest. It found as a "fact" that Eastern "voluntarily" relinquished its leasehold interest by not renewing its lease by the end of August, 1990 (App. 10a). It rejected the Trial Court's findings that OSM made Eastern's permit application futile by August 1990 as "speculatory (sic) reasoning" (*id.*), and ruled that the "futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases" (*id.*).[6] The Federal Circuit did not cite or acknowledge the holdings in *Petty Motor* and several other decisions by this Court upon which petitioners relied. Nor did it address or apply the rule expressed in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), and other decisions of this Court, that an agency cannot use unfair

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[6] In the Court of Appeals the government argued, *inter alia,* that extraordinary delay could cause only a temporary but never a permanent taking. However, even the government did not dispute that Eastern could recover for a taking if its permit application was futile by early August 1990 because OSM reached a final decision by then. *See* U.S. Opening Br., pp. 25-33; Rep. Br. pp. 7-11.

procedures to prevent the use of property.

The Court of Appeals analyzed Eastern's property interest in the remaining term of its lease, which extended from August 1990 to February 1991, from the perspective that Eastern could only assert a "temporary" taking of that interest for that time (App. 10a-11a, 15a). In that respect, on the question whether extraordinary delay made the government liable for a temporary taking of Eastern's remaining lease term, the Federal Circuit ruled that there was no extraordinary delay sufficient to cause a taking (App. 11a-15a). Citing *Williamson County Reg'l. Planning Comm. v. Hamilton Bank,* 473 U.S. 172 (1985), it stated that this Court has condoned delays of up to approximately eight years (App. 12a). Without addressing any of the evidence supporting the Trial Court's findings, the Federal Circuit ruled that the findings of extraordinary or bad faith delay were clearly erroneous, and that Eastern could not recover for a temporary taking of its leasehold interest (App. 15a).

In addition, the Federal Circuit summarily reversed the judgment for the Wyatts, without discussing it (App. 3a, 15a). That Court did not address in any respect the nature of the Wyatts' property interest, which is of timeless duration and never has expired, or explain why the Wyatts could not recover for a permanent or temporary taking.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision is at odds with *United States v. Petty Motor Co.,* 327 U.S. 372 (1946), *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999), and other decisions of the Court. The ruling below violates several fundamental precepts of this Court's takings jurisprudence and, if allowed to stand, would have far reaching effects. The Court of Appeals did not even cite *Petty Motor, Palazzolo,* or *Monterey.* On the other hand, it cited (App. 12a, 11a, n.6) with approval *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 216 F.3d 764 (CA9 2000), *cert.*

granted., ___ U.S. ___, 121 S.Ct. 2589 (2001), a decision obviously under review which in any event does not justify the Federal Circuit's rulings.

First, *Petty Motor* holds that when the government takes a renewable lease, it is liable for the value of both the remaining lease term, and any right to renew which exists at the time of the taking. *Palazzolo* confirmed that, once the uses of property permitted by an agency are known, a takings claim is ripe. The Federal Circuit disregarded *Petty Motor* and *Palazzolo,* and held that, even after proving that a permit application is futile, a leaseholder cannot recover for a permanent taking of the leasehold rights which exist when the application became futile. The effect of this unprecedented holding is to severely diminish the value of leasehold interests which are, by their nature, property interests of temporal duration. The Federal Circuit's decision is even more far reaching when applied to the Wyatts, who had a royalty interest of endless duration which never expired.

Second, the Trial Court made various specific findings that OSM had used unfair procedures, including effectively reaching a decision adverse to petitioners which it did not disclose. The Court of Appeals did not even apply the "repetitive or unfair" procedures standard reaffirmed in *Palazzolo,* 533 U.S. at 609. Indeed, it did not even address the Trial Court's crucial findings on the point, instead treating the issue as one involving solely the extent of delay. By so doing the Federal Circuit allowed OSM, contrary to *Palazzolo* and other decisions, to use unfair procedures to bar the use of property.

Third, in *Monterey* the Court held that several takings issues are in substantial part fact based, and therefore presumptively entitled to deference by a reviewing court. The Federal Circuit's treatment of those findings of the Trial Court which it did address -- those going to the issue of extraordinary delay -- conflicts with *Monterey*. The Federal Circuit followed erroneous standards in freely reversing the Trial Court's

findings, without giving them any deference. The Court of Appeals' conclusion that eight years clearly was not enough time for the agency to decide whether Eastern's mine would "adversely affect" the Park will place even more unreasonable burdens on property owners. This Court should review the decision below to explicate and enforce the proper standards for appellate review of trial court findings in takings cases.

This extreme decision is from the Circuit in which all takings claims for more than $10,000 against the United States must be brought. 28 U.S.C. §§ 1346(a)(2); 1491(a)(1). If allowed to stand, it will make it unreasonably difficult for even the most deserving takings plaintiffs to recover from the United States.

I. THE DECISION THAT THE OWNERS OF NEITHER A LEASE NOR OF A ROYALTY INTEREST CAN RECOVER FOR A TAKING, DESPITE PROVING FUTILITY, WARRANTS REVIEW.

A. As of early August 1990, Eastern's property consisted of its remaining lease term, and the right to renew. In *Petty Motor,* the United States formally condemned a renewable lease before the option to extend expired. The Court held that the tenant was entitled to compensation for the option period, and was not required to exercise the option. 327 U.S. at 380-81. *Accord, United States v. General Motors Corp.,* 323 U.S. 373, 376 n. 3 (1945). It follows that if there was a taking of Eastern's Leasehold interest by August 31, 1990, Eastern was entitled to compensation for its remaining lease term and the right to renew.

B. A regulatory takings claim is ripe for review once a court knows an agency's position on the scope of permitted development. *E.g., Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733, 738-44 (1997) (claim ripe because permission to build denied, although extent of compensation uncertain). In *Palazzolo* the Court held that a takings claim was ripe because the extent of allowable development on the property was known. The Court explained that once "the permissible uses of the

property are known to a reasonable degree of certainty, a takings claim is likely to have ripened," 533 U.S. at 609, and that a permit need be pursued "only if there is uncertainty as to the land's permitted use." *Id.* at 610.

The Trial Court made explicit findings that Eastern's permit application became futile (*e.g.*, OSM "never would have granted the permit"(App. 34a)) before the right to renew expired (App. 34a-38a: JA 1397-1400). Under these findings, there was a taking of Eastern's leasehold interests in early August 1990 because that is when the permit application became futile and the takings claim ripened.

Although the Trial Court relied on *Petty Motor* in awarding Eastern compensation for the taking of its right to renew (App. 38a), and although the Federal Circuit ordered supplemental briefing on the import of *Palazzolo* (App. 56a), the Federal Circuit's opinion disregards both decisions. The Federal Circuit did not disturb the Trial Court's futility findings. Instead, it held, in essence, that (1) because Eastern "voluntarily" did not renew its lease at the end of August 1990, it no longer had a property interest in renewal terms, and (2) even if Eastern proved that seeking a permit was futile before August 31, 1990, it does not matter because "the futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases" (App. 10a).

This *sua sponte* conclusion, which is unsupported by the citation of any authority, is circular and places the cart before the horse. If Eastern's permit application became futile before August 31, 1990, that makes all the difference, because Eastern's takings claim became ripe while it owned a right to renew, and it was entitled to compensation for that property interest. Once a permit application has become futile, the final decision requirement is met, and compensation is due.

The Federal Circuit's contrary conclusion is both inconsistent with this Court's decisions, and otherwise unsupportable. If in August 1990 OSM had issued a short letter

denying Eastern a permit on the ground that its mine would "adversely affect" the Park, there unquestionably would have been a final decision and Eastern's claim for a permanent taking of its lease, including the right to renew, would have been ripe. No different result should follow when the government makes a final decision but declines to put it in writing. The purpose of the ripeness doctrine is to enable agencies to arrive at considered decisions, not to allow them to place unreasonable hurdles in the path of owners which effectively destroy their property rights.

This ruling gives agencies an incentive not only to delay, but to avoid formalizing their decisions, especially when temporal property interests, such as renewable leases, are at stake. In this way, the decision below allows agencies to avoid paying just compensation by outlasting the owners of property interests of finite duration. The owner often cannot renew the (non-performing) lease without incurring a large financial obligation; and once the lease expires, the owner will no longer have a property interest to assert.

C. Unlike Eastern's lease, the Wyatts' royalty interest is of timeless duration. It never has expired. In 1991, the Wyatts transferred their royalty interest to their children, who own it today (App. 22a; JA 767). The Wyatt children joined the suit as plaintiffs precisely so that they, instead of their parents, could recover if the Trial Court found a taking after 1991, and they cross-appealed from the Trial Court's judgment (App. 1a). The Court of Appeals stated that "OSM denied the permit in a final action" in 1994 (App. 10a).[7] Under this reasoning, the Wyatt children had a ripe categorical takings claim as of 1994.

The Federal Circuit's summary reversal of the judgment for the Wyatts seems inexplicable, and certainly was not explained. Also unexplained is the Federal Circuit's failure to remand the claims by the Wyatt children so the Trial Court could

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[7] In fact, OSM denied the permit because Eastern allegedly failed to submit necessary information in response to OSM's third TDL (App. 18a; JA 764).

determine whether they could recover for a taking in 1994, under the terms of the Federal Circuit's own decision. The Court of Appeals' ultimate holding is that neither the Wyatts nor their children, who held property interests of timeless duration, could recover for a taking, despite proving futility, and despite the existence of a final decision. That ruling is quite far reaching and difficult to defend, and it warrants review.

II. THE COURT OF APPEALS' FAILURE TO FOLLOW OR APPLY THIS COURT'S DECISIONS PROHIBITING UNFAIR OR REPETITIVE LAND-USE PROCEDURES ALSO WARRANTS REVIEW.

In *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 350, n. 7 (1986), the Court explained that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain" a decision on what uses can be made of its property. In *Palazzolo,* the Court, citing *Monterey,* reaffirmed that:

> "Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." [533 U.S. at 609].

The Trial Court made several findings that OSM used repetitive and unfair procedures to avoid issuing a final decision in writing. It specifically found, *inter alia,* that "OSM's policy was to stop Eastern's development without taking a final action that plaintiff could appeal" (App. 36a); that OSM "waged a war of attrition against Eastern" (App. 36a); and that OSM "purposely delay[ed] action on plaintiffs' [permit] application until after their lease expired" (App. 32a). The Trial Court also found that Eastern's leasehold had lost all value by early August 1990 for straightforward reasons. It was in early August 1990, after the outside consultants had done all the studies OSM requested, that OSM, with knowledge that Eastern's lease was about to expire, concocted an *ad hoc*, "confidential" and unpublished new plan,

not called for by statute, regulation or prior practice, under which the application would go through numerous further steps, none of which could result in the granting of a permit. *See* App. 34a-38a; JA 1397-1400.

Although the Federal Circuit addressed and reversed the Trial Court's findings on extraordinary delay, *see* App. 11a-15a, it completely ignored the issue of unfair agency procedures. The Court of Appeals neither applied the "repetitive and unfair land use procedure" standard, nor dealt with the Trial's Court findings on repetitive and unfair procedures. By so doing, the Court of Appeals circumvented *Palazzolo, Monterey,* and other decisions of the Court which make clear that takings claims are ripe when agencies resort to unfair procedures.

In *Palazzolo,* the Court stated that agencies could not use unfair procedures "to avoid a final decision." 526 U.S. at 609. In this case the Trial Court made findings that OSM had, in effect, made a decision to deny a permit but declined to put that decision in writing,[8] and the Court of Appeals did not reverse those findings. If an agency cannot unfairly avoid reaching a final decision, *a fortiori* it cannot act to outlast the owner of a lease until after it expires by withholding the issuance of a final decision it has in fact reached.

The unfairness of OSM's actions is further shown by the fact that under SMCRA Eastern should have been granted a permit shortly after it applied for one in 1982. 30 U.S.C. § 1256(d)(1) provides that, subject to certain exceptions, "[a]ny valid permit issued pursuant to this Act shall carry with it the right of successive renewal upon expiration." In 1982 Eastern applied for a *renewal* permit, not a new one, as both the State

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[8] Such is the import of the findings that OSM "had no intention of ever granting the permit" (App. 28a) and "never would have granted the permit," (App. 34a); and that "OSM's policy was to stop Eastern's development without taking a final action that plaintiff could appeal" (App. 36a).

and OSM have acknowledged.[9] Section 1256(d)(1) does not allow an agency to deny a renewal permit on that ground that a mine would "adversely affect" a Park within the meaning of § 1272(e)(3). Under § 1256(d)(1), Eastern was entitled to a renewal permit, and OSM should not have been inquiring into the "adversely affect" issue at all. This makes the unfairness of OSM's actions even more stark, and the Court of Appeals' willingness to tolerate them even more far reaching.

III. THE COURT OF APPEALS' FAILURE TO FOLLOW THIS COURT'S DECISIONS REQUIRING APPELLATE COURTS TO GIVE DEFERENCE TO FACTUAL FINDINGS IN TAKINGS CASES ALSO WARRANTS REVIEW.

A. In *Monterey,* a jury returned a verdict finding the City liable for a taking. The Court noted that "we have described determinations of liability in regulatory takings cases as 'essentially ad hoc, factual inquires,'" 526 U.S. at 720, citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992), quoting *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). The Court held in *Monterey* that the "issue whether a landowner has been deprived of all economically viable use of his property is a predominately factual question," and the question whether the regulation substantially advances legitimate state interests is "a mixed question of fact and law," and affirmed the verdict. 526 U.S. at 720-21.

Separate from its findings of futility and extraordinary delay, the Trial Court made several other findings which are relevant to whether there was a taking. For example, the Trial Court found that plaintiffs "reasonably relied on the two permits they received . . . when they invested in the property" (App. 29a); that OSM "prevented Eastern . . . from renewing its lease" (App.

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[9] The State stipulated in a 1984 Order that Eastern's 1982 application was for a renewal permit (or a re-permit), and the United States so acknowledged in its interrogatory responses in the Trial Court (JA 1183, 1425, 1434; *see* JA 1475).

38a); that the government "destroyed the fruits of [plaintiffs'] investments" by purposeful delay (App. 32a); and that "Eastern's claim is ripe for adjudication" (App. 23a). The Trial Court's ultimate conclusion that there was a taking is in substantial part fact based. The Court of Appeals did not reverse any of these findings, but failed to give them any effect. By so doing the Court of Appeals failed to follow *Monterey*.

Although the Court of Appeals stated that it reviews findings of fact for clear error, it also stated that "whether a taking has occurred is a question of law based on factual underpinnings" (App. 9a). To the extent the Court of Appeals believed that it was free under this standard to disregard any of the Trial Court's relevant findings in arriving at the legal conclusion that there was no taking, the Court of Appeals applied an erroneous standard of review and failed to follow *Monterey*.

B. The Court of Appeals did address and reverse as clearly erroneous the Trial Court's findings of extraordinary delay. It ruled that Eastern could not recover for a taking of its remaining lease term, which extended from August 1990 to February 1991, because there was no extraordinary delay as a matter of law (App. 11a-15a). However, the Court of Appeals did not address any of the evidence which supported the Trial Court's delay findings or give any explanation as to why they were erroneous. By so doing, the Court of Appeals further circumvented *Monterey*.

The Federal Circuit not only overlooked the evidence supporting the Trial Court's delay findings. It also made several statements which directly conflict with the evidence. To take just some examples: the Court of Appeals asserted that "much of the delay through 1991 was caused by" Eastern's failure to submit information (App. 15a). But Terry Small, who headed OSM's SOAP office, testified that no delay which may have occurred after January 1986 was attributable to Eastern (JA 52 (Tr. 310)). The Court of Appeals stated that OSM determined in 1990 that it needed additional information to assess hydrologic impact (App. 14a-15a). But OSM's Richard Mann, who was in charge of the

hydrology issues, testified that OSM had adequate information to make an "adversely affect" finding on the hydrology issues at all times since *1986* (JA 41 (Tr. 246-48)).

Although the Federal Circuit stated that "OSM did not cause any extraordinary delay" (App. 13a), it failed to mention the testimony of an OSM official that, except for Eastern's case (and abandoned applications) OSM has decided even the most complex cases in about 2½ years, and others in less time (JA 319 (Tr. 1866-67)). It also overlooked the fact that OSM had completed its technical review in 1985, when it decided to grant a permit, but then demanded voluminous additional information after the State objected. It also overlooked the fact that it was the Interior Department's own ALJ, not the Trial Court, who stated that OSM attempts to seek reclamation while the permit application was pending would constitute "bad faith." *See supra,* p. 6. The Federal Circuit stated that Eastern "never informed OSM that it had relinquished its" lease (App. 11a). But the head of OSM's SOAP office testified that Bernos informed him "several times" of the looming lease expiration and the need for action (JA 46 (Tr. 277-78)). The Federal Circuit stated that in February 1991 Eastern's lease was terminated and it lost its "right of access to mine the property"(App. 11a). It overlooked the fact that Eastern remained in possession as a holdover tenant, with Cane's consent, until 1993 (JA 84 (Tr. 496-98)).

Williamson County, upon which the Court of Appeals relied (App. 12a), did not condone delays of approximately eight years. Instead, the Court held that a takings claim was not ripe because the owner failed to follow available procedures for obtaining a variance from zoning decisions. 473 U.S. at 190-95. No such procedures were available here.[10]

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[10] OSM had available a procedure under which Eastern could seek an exemption from SMCRA's permitting requirement by establishing that it had Valid Existing Rights ("VER") before SMCRA was passed. *See* 30 C.F.R. § 761.5 (1988). Eastern exhausted this potential remedy by filing a VER application, which OSM denied (JA 1404-12; App.7a).

C. Eight years elapsed between 1982 and 1990, when Eastern's right to extend its lease expired. Four years elapsed between 1986, when OSM issued an "unripe" denial, and 1990. OSM had from 1984 on simply to determine whether Eastern's mine would "adversely affect" the Park, and it had no need to continue a technical review which it completed in 1985. By reversing the Trial Court's findings of extraordinary delay as clearly erroneous, and impliedly concluding that OSM clearly did not have enough time to consider the renewal permit application, the Federal Circuit has legitimized dilatory tactics. It has reached an extreme result which undermines property rights, and is fundamentally inconsistent with several decisions of the Court.

IV. IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE FAR REACHING CONSEQUENCES.

This is an unusually strong regulatory takings case. The Wyatts initially bought their property in 1953. All persons who owned interests in the property when SMCRA was passed in 1977, *i.e.*, the Wyatts and Bernos, joined this suit as plaintiffs. And the takings claimed here were categorical. The Trial Court entered judgments for categorical takings after it found that Eastern's and the Wyatts' property interests were rendered "valueless" (App. 31a). That finding is correct – – neither a coal lease nor a royalty has any value if the property cannot be mined – – and the Federal Circuit did not disturb it.

Generally speaking, the right to compensation is strongest where, as here, the regulatory taking is categorical.[11] That right

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[11] The government's defenses in a categorical case are limited, and eight Justices have confirmed that investment backed expectations is not a factor in a categorical case. Citing *Lucas*, 505 U.S. at 1015 (1992), Justice Kennedy's majority opinion in *Palazzolo* states:

> "First, we have observed, with certain qualifications, *see infra* at 614-15, that a regulation which 'denies all economically beneficial or (fn. continued next page)

is even stronger if the categorical case is one in which a plaintiff detrimentally relied upon validly issued permits before suffering a total prohibition on use.[12] The right is stronger still if the categorical case is one in which a trial court is presented with extensive evidence, including internal documents, of unfair and bad faith agency action, and in which the trial court makes explicit and detailed findings of futility and intentional delay. If these petitioners cannot recover from the United States for a regulatory taking, it is difficult to understand who could.

This decision is from the Circuit in which all takings cases for more than $10,000.00 against the United States must be brought. It reflects an egregious failure to follow legal principles clearly set forth in this Court's decisions. If allowed to stand, this decision will make it extremely difficult for even the most deserving property owners to recover from the United States. It

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(fn. continued) productive use of land' will require compensation under the Takings Clause." [533 U.S. at 607].

Justice Ginsburg's dissenting opinion in *Palazzolo* (joined by Justices Souter and Breyer) states that, subject to the nuisance defense, "denial of 'all economically beneficial or productive use of land' constitutes a taking." [Ginsburg, J., dissenting on other grounds, 533 U.S. at 627, quoting *Lucas*, 505 U.S. at 1013].

Compare Palm Beach Isles Ass's. v. United States, 231 F.3d 1365, 1367-70 (CAFed. 2000) (Gajarsa, J., dissenting from the denial of rehearing en banc).

[12] Tennessee, like most states, recognizes the doctrine of "vested rights," under which a plaintiff who obtains a valid permit and spends funds in reliance thereon obtains a kind of property interest in renewal permits. *See Howe Realty Co. v. City of Nashville*, 176 Tenn. 405, 141 S.W.2d 904, 906 (1940); and *Moore v. Memphis Stone & Gravel Co.*, 47 Tenn. App. 461, 470-72, 339 S.W.2d 29 (1959). By the time Eastern applied for a renewal permit in 1982, it already had received two valid permits under which it spent large sums preparing the property for mining. Under Tennessee law, Eastern had not only a property interest in its leasehold, but a separate property interest in a renewal permit.

will give the government a blueprint showing how to deliberately delay action on permit applications, and exhaust the applicant's resources. It will deter potential plaintiffs from bringing viable takings claims. And it will deter judges in the Court of Federal Claims from awarding compensation for takings even in compelling cases.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

Appendix A – – Notice of Entry of Judgment and Opinion of the United States Court of Appeals for the Federal Circuit Dated and Entered November 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 11/19/01

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.
[* * *]

JAN HORBALY
Clerk

cc: JEFFREY C. DOBBINS
RAYMOND D. BATTOCCHI
CHARLES F. LETTOW

EATERN MINERALS V. US, 99-5054, -5059 CFC-94-CV-1098

* * * * *

ANNE D. WYATT, EASTERN MINERALS INTERNATIONAL, INC., VAN BUREN MINERALS CORPORATION, MILTON J. BERNOS, JR., NANCY WYATT ZORN, WILSON W. WYATT, JR. and MARTIN P. DUFFY, Executor of the Estates of Wilson W. Wyatt, Sr.,and Anne D. Wyatt, Plaintiffs-Cross Appellants, v. UNITED STATES, Defendant-Appellant. 99-5054, 99-5059

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, November 19, 2001, Decided

PRIOR HISTORY: Appealed from: United States Court of Federal Claims. Judge Robert H. Hodges, Jr.

Eastern Minerals Int'l v. United States, 36 Fed. Cl. 541, 1996 U.S. Claims LEXIS 173 (1996)

Eastern Minerals Int'l v. United States, 39 Fed. Cl. 621, 1997 U.S. Claims LEXIS 271 (1997)

DISPOSITION: REVERSED.

COUNSEL: Raymond D. Battocchi, Gabeler, Battocchi & Griggs LLC, of McLean, Virginia, argued for plaintiffs-cross appellants. With him on the brief were John R. Powell, and Vicky Ann Paisley. Of counsel on the brief was Walter H. Fleischer, of Washington, DC.

Jeffrey C. Dobbins, Attorney, Environment and Natural Resources Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Lois J. Schiffer, Assistant Attorney General; Marc A. Smith, and Andrew C. Mergen, Attorneys. Of counsel on the brief was Daniel W. Kilduff, Attorney, Office of the Solicitor, Department of the Interior, of Washington, DC.

Charles F. Lettow, Cleary, Gottlieb, Steen & Hamilton, of Washington, DC, for amicus curiae Cane Tennessee, Inc. Of counsel on the brief were Michael A. Mazzuchi, and Timothy A. Vogel.

JUDGES: Before NEWMAN, BRYSON, and GAJARSA, Circuit Judges.

OPINION: GAJARSA, Circuit Judge.

In this regulatory takings case, the United States appeals the October 6, 1996 and November 25, 1997 judgments of the United States Court of Federal Claims on the issue of liability. Plaintiff Van Buren Mineral Corporation ("Van Buren") cross-appeals the trial court's judgment that its claims are unripe. Plaintiffs Eastern Mineral International, Inc. ("EMI"), Wilson Wyatt, Sr., and Anne D. Wyatt ("the Wyatts") further cross-

appeal the trial court's award of damages.[1]

After dismissing a variety of the plaintiffs' claims as unripe, the trial court held that the federal government had effected a permanent regulatory taking of the property interests of EMI and the Wyatts. *E. Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541, 552 (1996).* The court further held the government liable for the takings, and awarded EMI $15,866,311 and the Wyatts $3,743,766, plus compound interest. *E. Minerals Int'l, Inc. v. United States, 39 Fed. Cl. 621, 631 (1997).* For the reasons discussed below, we reverse the judgment of the trial court on the issue of liability, and dismiss the cross-appeals as moot.

I. BACKGROUND

This case concerns the administration of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or the "Act"), *30 U.S.C. § 1201* et seq.. Concerned that "many surface mining operations result in disturbances of surface areas and adversely affect commerce and the public welfare," *30 U.S.C. § 1201*(b), Congress passed the Act to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *30 U.S.C. § 1202*(a) (1994). The Act created the Office of Surface Mining Regulation and Enforcement ("OSM") within the Department of the Interior and authorized the Secretary of the Interior ("Secretary") to administer the Act by promulgating regulations and enforcing its provisions. *30 U.S.C. §§ 1211*(a), 1211(c) (1994); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268-69, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).*

The Act regulates surface coal mining through a two-phase program designed to balance both federal and state interests. See *Hodel, 452 U.S. at 289* (describing the Act as establishing "a program of cooperative federalism"). During the initial regulatory phase the federal government promulgates and

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[1] A brief urging affirmance as to liability and partial reversal and remand as to damages was filed by Cane Tennessee, Inc. as amicus curiae.

enforces basic environmental protection standards. These standards include requirements for restoration of land, preservation of topsoil, and protection of the hydrological balance. *30 U.S.C. §§ 1252*(c), 1265(b) (1994). The federal standards are complemented by continuing state regulations. States can issue permits for surface mining, but only if the applicant complied with federal interim standards concerning the environmental impact of the proposed mine. Id. § 1252(b).

The initial phase is followed by a permanent phase, during which each state adopts its own regulatory program to provide for compliance with the various federal performance standards. Id. § 1253(a). The goal of the program is to allow states to tailor their permitting schemes to meet their own needs, within a general framework of federal oversight. If a state's program does not meet basic federal standards, the Secretary is required to step in with his own program for assuring compliance. Id. § 1254(b). Under no circumstances may a person engage in surface coal mining without a permit from an appropriate regulatory agency. Id. § 1256(a).

The property at issue in this case is located in Bledsoe and Van Buren Counties in southeastern Tennessee, adjacent to the Fall Creek Falls State Park. On December 12, 1975, Wilson Wyatt, Sr. and Anne D. Wyatt sold the property to Milton J. Bernos, Jr. Under the conditions of the sale, as amended, the Wyatts were to receive $4.3 million in installments and retain a 3.5% royalty interest in all coal extracted from the property.

In December 1978, Bernos canceled his contract with the Wyatts. By this time, Bernos had acquired a portion of the property, but the majority remained in the Wyatts' hands. In 1979, the Wyatts sold their remaining interest in the property to Cane Co., Ltd. (later Cane Tennessee, Inc.) ("Cane"). Once again, the Wyatts retained a 3.5% royalty interest in the minerals. Meanwhile, Bernos sold his interest in the property to Colten, Inc. ("Colten"). Colten then immediately entered into a lease with Van Buren, a company wholly owned by Bernos.

Thereafter, Cane granted an exclusive lease to mine the property to EMI, another company wholly owned by Bernos.

Although the term of this lease was set to expire on February 28, 1991, EMI had the right to extend the lease term for four ten-year terms upon 180 days notice to Cane. EMI could not, however, exercise the right to extend the lease term after August 1990.

After signing the lease, EMI set out to secure the necessary permits to begin mining the property. On February 4, 1980, the Division of Surface Mining and Reclamation of the Tennessee Department of Conservation ("DSM") issued EMI a one-year permit under DSM's interim regulatory program. As required under the Act, DSM found that the proposed mine would not "adversely affect" the adjacent park. See id. § 1272(e)(3). The permit granted EMI permission to disturb thirty-three acres on the property. With the permits in hand, EMI executed a box cut on the property to extract coal from the Sewannee coal seam, and also constructed various "improvements" to the land, including a sediment pond, a backfill area, and various roads. Adhering to the requirements of *30 U.S.C. § 1272*(e)(5), EMI located the box cut just over 300 feet from the property's boundary with the Fall Creek Falls State Park.

Four months after the permit expired, on June 18, 1981, EMI again applied for a permit from the DSM. On September 14, 1981, DSM granted EMI another one-year permit. After this permit expired, EMI filed another application with DSM for still another permit.[2] The DSM rejected this permit application on May 8 1984. It found that EMI had not adequately addressed the issues of noise, water quality and subsidence.[3] On August 15, 1984, the Tennessee Surface Mining Board of Reclamation affirmed the rejection.

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[2] By this time, DSM was reassigned to the Tennessee Department of Health and Environment.

[3] DSM also noted that Mr. Bernos, the sole shareholder of Cane, had violated various coal mining regulations in the past. See *30 U.S.C. § 1260*(c) (1994) (barring any applicant with outstanding environmental violations from receiving permit until agency receives assurances that violations have been resolved).

Later that year, OSM determined that Tennessee had not effectively implemented its SMCRA program. Pursuant to its authority under the Act, OSM revoked the state's authority, and assumed control of the Tennessee surface mining regulatory program. At the same time, under the regulations promulgated by the agency, the state retained joint reviewing authority.

OSM reviews permit applications in three stages. First, the agency reviews an application to determine if it is administratively complete. After the agency is satisfied that it has all the necessary information, it conducts a technical review to determine if the proposed mining operation meets all substantive legal requirements. Finally, OSM closes out the application, whereupon it addresses any final legal matters, such as the securing of any bonds.

In October of 1984, EMI applied for a new permit from OSM. In its application, EMI sought to disturb 26.3 acres of the Cane property and mine approximately 4,600 acres of coal. On December 31, 1984, OSM notified EMI that its application was administratively incomplete. After EMI acknowledged and corrected the deficiencies, OSM informed EMI that it would need the approval of the Tennessee DOC if OSM determined that the proposed mine would adversely affect the Fall Creek Falls Park, pursuant to *30 U.S.C. § 1272*(e)(3).

OSM then commenced its review of EMI's application. On May 30, 1985, OSM issued EMI a technical deficiency letter ("TDL") outlining various concerns about the proposed mine. Among these concerns were the effect of the mine on Cane Creek and the impact of the mine on the "scenic and solitude values of Falls Creek Falls State Park." On June 25, 1985, EMI responded to the TDL with a letter that included little of the information requested by OSM.

In August of 1985, the State of Tennessee exercised its joint-review authority, and objected to the permit application. The state believed that the mine would have adverse environmental impacts on the surrounding area. On December 12, 1985, OSM issued another TDL requiring specific information to satisfy the hydrologic and environmental impact requirements of the Act

pursuant to *30 U.S.C. § 1257*. This TDL contained five pages of specific information necessary for OSM to approve the application. On January 15, 1986, in response to the deficiency letters, EMI sought financial assistance in complying with the request for additional information from OSM's Small Operator Assistance Program ("SOAP").[4] On July 2, 1986, OSM denied the permit application before it acted on the SOAP application. The agency had concluded that the proposed mine would adversely impact the park by causing excessive noise and possibly adverse hydrological consequences.[5] On July 30, 1986, EMI appealed the denial to an administrative law judge ("ALJ").

This began a lengthy period of further review. Because OSM had not conclusively established a hydrological impact from the proposed mine, the ALJ asked the parties to work with one another to provide OSM the information it needed for its hydrological assessment. OSM also agreed to review EMI's claim that it enjoyed valid existing rights ("VER") in the property that relieved it from any ban on mining near the park. At EMI's request, OSM was ordered to decide the VER claim before EMI spent any additional funds on complying with OSM's request for more information. On January 20, 1988, OSM denied the claim for VER. On February 1, 1988, OSM submitted a revised TDL to EMI outlining the information it still required.

EMI did not respond to the February 1, 1988 TDL. Instead, it elected to apply again for SOAP funds. The August 1990 deadline for extending the Cane lease came and went without

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[4] SOAP's purpose "is to provide for eligible operators a determination of probable hydrologic consequences and a statement of results of test borings or core samplings which are required components of the permit application." *30 C.F.R. § 795.1*; *30 C.F.R. § 795.6* (listing eligibility requirements for SOAP).

[5] Having denied EMI's permit application, OSM then denied EMI's SOAP application based on *30 C.F.R. § 795.6(a)(3)* (2001) (limiting SOAP eligibility to applicants not restricted from obtaining permit).

EMI exercising its option. As provided under its terms, the lease expired on February 28, 1991. Meanwhile, OSM had determined that any mining on the Cane and Colten lands would "adversely affect" the park. OSM was concerned about both surface water and groundwater discharges, and had decided that EMI could not assuage these concerns.

On August 25, 1993, OSM issued another TDL. Once again, OSM requested specific information from EMI necessary to complete its assessment. Although SOAP had funded drilling, a lineament study, and a fracture analysis, OSM found a number of deficiencies in the information supplied to the agency. On February 18, 1994, OSM again informed EMI that a response to the TDL was essential to the permit review. Finally, on April 13, 1994, OSM denied EMI's permit request.

The plaintiffs then filed suit in the United States Court of Federal Claims. The plaintiffs contended that the government's "extraordinary delay" in reviewing the permit application resulted in Bernos losing both long-term leases. After a trial, the court issued an opinion and order dated October 2, 1996 dismissing the claims of various plaintiffs for jurisdictional reasons. *E. Minerals, 36 Fed. Cl. at 547-48.* However, the court rejected the government's argument that EMI's claim was ripe only as to the Cane property, the only property for which it sought a permit. *Id. at 547.* The court agreed with the plaintiffs that any effort at securing a permit for the Colten property would have been futile. *Id.*

Addressing the merits of EMI and the Wyatts' claim, the court held that "extraordinary government delay may result in a constructive permit denial," and thus a permanent taking. *Id. at 548.* The court further held that the delay suffered by EMI and the Wyatts established a compensable economic impact and that EMI and the Wyatts had sufficient investment-backed expectations based on the two permits EMI had received earlier from DSM. *Id. at 550-51.*

In an order dated April 21, 1997, the court expounded on its earlier holding on the issue of liability. The government then moved for reconsideration. On November 25, 1997, the court

granted the motion, but increased the compensation awarded to EMI and the Wyatts. Ultimately, on December 22, 1998, the court entered a final judgment awarding damages to both EMI and the Wyatts. The United States now appeals the judgment of the trial court, and the plaintiffs cross-appeal.

II. STANDARD OF REVIEW

In reviewing the judgments of the Court of Federal Claims, this court examines findings of fact for clear error and reviews legal conclusions completely and independently. *Bass Enterprises Prod. Co. v. United States, 133 F.3d 893, 895 (Fed. Cir. 1998); Columbia Gas Sys., Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995).* Whether or not a taking has occurred is a question of law based on factual underpinnings. *Alves v. United States, 133 F.3d 1454, 1456 (Fed. Cir. 1998); Bass Enters. Prod. Co. v. United States, 133 F.3d 893, 895 (Fed. Cir. 1998); Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1172-73 (Fed. Cir. 1991).* We have jurisdiction over the appeal pursuant to *28 U.S.C. § 1295*(a)(3).

III. DISCUSSION

A. Scope of the Asserted Taking

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. The Supreme Court has recognized that the government may "take" private property by either physical invasion or regulation. *Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1014-15, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992); Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999).*

As discussed above, the plaintiffs in this case allege regulatory takings by the federal government. It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation. *Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74, 35 L. Ed. 2d 1, 93 S. Ct. 791 (1973); Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Indiana, 57 F.3d 505, 509 (7th Cir. 1995); Cavin v. United States, 956 F.2d 1131, 1134 (Fed. Cir. 1992).*

In this case, OSM denied the permit in a final action on April 13, 1994. However, EMI voluntarily chose not to renew its leasehold interest in August of 1990. Thus, as of February 28, 1991, EMI possessed no valid property interest from which it could assert a takings claim.

EMI attempts to sidestep this critical requirement by arguing that the government action constituting the taking occurred in 1990, before the April 13, 1994 final action. In other words, EMI argues that government delay prior to February 28, 1991 amounted to a permanent taking of its leasehold interest to mine the Cane property. Indeed, the trial court reasoned that "if a permit had been granted before August 1990, [EMI] would have extended the lease for as long as necessary to mine all the merchantable coal in the ground." *E. Minerals, 39 Fed. Cl. at 626.* The trial court excused EMI's decision to relinquish its leasehold interest because it determined that the permit application, and thus the lease renewal, would have been futile. However, such speculatory reasoning belies the bedrock requirement that the existence of a valid property interest is necessary in all takings claims. See U.S. Const. amend. V. It is true that the futility exception may sometimes excuse a property owner from submitting "multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Heck v. United States, 134 F.3d 1468, 1472 (Fed. Cir. 1998).* However, the futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases.

The fact remains that EMI chose to relinquish its leasehold interest well before OSM's final decision. If EMI had renewed its lease, it may have been able to assert a permanent taking of its leasehold interest to mine the Cane property. However, we cannot allow the voluntary relinquishment of a property interest to transform a temporary taking into a permanent taking.[6]

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[6] Temporary takings are not different in kind from permanent takings. *First English Evangelical Lutheran Church v. L.A. County, Calif., 482 U.S. 304, 321, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).*

(continued...)

Moreover, although EMI continued to pursue the permit application, it never informed OSM that it had relinquished its leasehold interest. Had OSM been aware of this fact, it would have been required to deny immediately the permit application because EMI no longer had a right of access to mine the property. See *30 C.F.R. § 778.15* (2001). For this reason, EMI cannot legally assert a permanent takings claim subsequent to February 28, 1991, and moreover, for the reasons discussed below, we find that there has been no compensable taking prior to February 28, 1991.

B. Extraordinary Delay

EMI argues that as of 1990, extraordinary government delay in processing its permit application constituted a taking. However, we hold that any delay in processing the permit application was not sufficiently "extraordinary" to constitute a taking.

We note that the existence and initiation of permit proceedings does not itself constitute a taking. Indeed, government "could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal Co. v. Mahon,*

(...continued)
A temporary taking occurs when what would otherwise be a permanent taking is temporally cut short. For example, a temporary taking may occur when a court invalidates a regulation after the taking has already occurred. See, e.g., *Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800 (Fed. Cir. 1993).* A temporary taking may also occur when the government elects to discontinue regulations after a taking has occurred. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000),* cert. granted, *150 L. Ed. 2d 749, 121 S. Ct. 2589* (June 29, 2001). The essential element of a temporary taking is a finite start and end to the taking. In this case, as discussed above, the taking ended by act of law when EMI voluntarily relinquished its valid property interest. Thus, EMI is only entitled to assert a temporary taking from 1990 (when EMI asserts that OSM began its campaign of "extraordinary delay") through February 28, 1991 (when EMI gave up its leasehold interest).

260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922). The mere requirement that "a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted." *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985).* Moreover, mere "fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership." *First English Evangelical Lutheran Church v. L.A. County, Calif., 482 U.S. 304, 320, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).*

However, it is true that a taking may occur by reason of "extraordinary delay in governmental decisionmaking." *Tabb Lakes, 10 F.3d at 803.* Other courts have recognized that extraordinary delay must be "substantial" and that the Supreme Court has condoned delays up to "approximately eight years." *Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1233 (9th Cir. 1994)* (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985));* see also *Tahoe-Sierra, 216 F.3d at 781-82* (holding that a temporary development moratorium of up to forty months did not constitute a temporary taking); *Dufau v. United States, 22 Cl. Ct. 156, 163 (Cl. Ct. 1990)* (holding that permit delay of sixteen months did not constitute a temporary taking). The length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay. Because delay is inherent in complex regulatory permitting schemes, we must examine the nature of the permitting process as well as the reasons for any delay. Moreover, it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith. Cf. *Tabb Lakes, 10 F.3d at 799.*

Complex regulatory schemes often require detailed information before the issuance of a permit. The nature of the regulatory scheme is especially critical when the permitting process requires detailed technical information necessary to determine environmental impacts. Governmental agencies that

implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations. Finally, we must recognize that delay in the permitting process may be attributable to the applicant as well as the government.

A brief synopsis of the application process demonstrates that OSM did not cause any extraordinary delay in this case. EMI applied for the permit at issue in October of 1984. In December of 1984, OSM informed EMI that the application was missing at least twenty-eight items of required administrative information. In March of 1985, after EMI provided the required information, OSM informed EMI that the application was administratively complete. Subsequently, OSM began its technical review of the application. In May of 1985, OSM informed EMI that its application did not contain all of the information necessary to complete the technical review. OSM requested at least eighteen specific items of information necessary to complete its technical review. Among other things, OSM requested that EMI provide documentation demonstrating that the mining operations (1) would not physically alter the flow of the nearby Cane Creek, (2) would not chemically alter the waters, (3) would not adversely impact the biological ecosystem of Cane Creek, and (4) would not adversely affect the aesthetic and environmental integrity of the nearby Fall Creek Falls State Park ("State Park"). One month later, EMI provided a letter response to the OSM request.

In September of 1985, OSM informed EMI that its letter failed to include much of the information requested, and that additional "considerable information" would be necessary. In December of 1985, OSM informed EMI of at least twenty-nine specific pieces of information necessary to establish the environmental impact of mining on Cane Creek and the State Park. EMI did not respond to the request, and instead, in January of 1986, applied for SOAP funding. In July of 1986, OSM denied the permit application based on its conclusion that the mining operations would cause adverse impacts to the area due to excessive noise and adverse hydrologic consequences.

EMI then appealed this decision to an ALJ. Throughout 1987, the appeal progressed before the ALJ. In January of 1988, the ALJ ordered OSM to provide another detailed TDL explaining exactly what information was required. OSM issued the additional TDL in February of 1988.

Again EMI did not respond to the request, and instead applied for SOAP funding. During the next year, EMI failed to respond to the February 1988 TDL. In May of 1988, OSM noted that EMI had not yet responded to the TDL, and informed EMI that its SOAP application was placed on hold due to the existence of administrative violations attributable to Bernos. In July of 1989, Bernos paid the civil penalties owed on the administrative violations. Over the next few months, SOAP funds were used to hire an engineering firm to investigate the hydrology of the area and prepare a geological report. In April of 1990, EMI submitted the report to OMS. In July of 1990, OMS informed EMI that the SOAP report was inadequate and did not address all of the deficiencies in the application. Specifically, OSM noted that "little useful data was collected from the phase 1 SOAP study" and informed EMI that additional testing would be necessary to judge the full hydrological impact of mining operations. In August of 1990, EMI chose not to extend its leasehold interest in the Cane property. On February 28, 1991, EMI's leasehold interest in the Cane property was terminated.

Prior to this date, the record does not support a finding that there was "extraordinary" government delay. Indeed, the trial court determined that the delay did not become extraordinary until late 1990. *E. Minerals, 36 Fed. Cl. at 548.* The trial court reasoned that after 1990, "OSM's policy was to stop [EMI's] development without taking a final action." *E. Minerals, 39 Fed. Cl. at 625.* However, OSM's decision in July of 1990 to require additional information does not constitute extraordinary delay. As discussed above, we recognize that OSM has considerable technical expertise in determining the level of information necessary to provide an adequate hydrological study. OSM determined that the phase 1 SOAP study provided "very little useful hydrogeologic data" and that additional wells and pumping tests would be required. As noted, we must afford

OSM significant deference in determining the extent of information necessary for a complete hydrogeologic report. Moreover, we also note that much of the delay through 1991 was caused by the failure of EMI to respond to OSM's requests for information, and the appellate process before the ALJ.[7] Finally, we observe that the trial court's finding of bad faith delay on the part of OSM throughout the entire permitting process is inadequately supported. For these reasons, we hold that the plaintiff failed to establish the requisite showing of extraordinary government delay to constitute a temporary taking prior to February 28, 1991. Any finding by the trial court to the contrary is clearly erroneous.

IV. CONCLUSION

Because EMI voluntarily relinquished its leasehold interest on February 28, 1991, it may only assert a takings claim prior to that date. There was no extraordinary government delay sufficient to constitute a taking. Accordingly, we reverse the judgment of the Court of Federal Claims, and dismiss the cross-appeals as moot. In view of this conclusion, we need not consider any of the other arguments submitted by the parties.

REVERSED. COSTS. No costs.

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[7] We also note that some of the delay was due to EMI's pursuit of SOAP funding. It is important to point out that SOAP funding is not a guaranteed right in the permitting process. See *30 U.S.C. § 1257*(c) (1994); 30 C.F.R. § 795 (2001). Applying for SOAP funding is an elective process and does not guarantee that the permit applicant will receive funding.

Appendix B – – Opinion and Order of the United States Court of Federal Claims Dated and Filed October 2, 1996

EASTERN MINERALS INTERNATIONAL, INC., et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.

No. 94-1098 L

UNITED STATES COURT OF FEDERAL CLAIMS

36 Fed. Cl. 541; 1996 U.S. Claims LEXIS 173; 43 ERC (BNA)1655

October 2, 1996, Filed

COUNSEL: Raymond D. Battocchi and John R. Powell, McLean, Virginia, for plaintiffs.

Marc A. Smith, United States Department of Justice, Washington, D.C., for defendant.

JUDGES: Robert H. Hodges, Jr., Judge

OPINION: OPINION & ORDER, HODGES, Judge.

This case is before the court after trial on the merits. Plaintiffs allege a taking of their property interests, and they seek just compensation.

Facts

The Wyatts purchased property in eastern Tennessee in 1953. In 1975, the Wyatts entered an installment contract to sell some of the land to Milton Bernos, and they retained a royalty interest. The parties later amended the contract to extend the closing date and increase the Wyatt's royalty interest to 3.5% of the gross sales price on all coal mined from the property. The 1975 contract was canceled in 1978.[1]

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[1] The cancellation agreement provided that in exchange for the principal payment of $175,000, the Wyatts conveyed 175,000 tons of coal to Bernos.

Congress enacted the Surface Mining Control and Reclamation Act in 1977. SMCRA required states to develop regulatory programs for mining or submit to a federal program. It also established permitting requirements and prohibited surface mining without a permit. Until 1982, Tennessee administered the Act under federal provisions. In August 1982, Tennessee received conditional approval of a permanent regulatory program. In 1984, the Interior Department's Office of Surface Mining assumed direct federal enforcement of Tennessee's program.

Cane Company bought property from the Wyatts in 1979. The Wyatts retained a 3.5% royalty interest. Cane leased the property to Eastern Minerals International, a company that Bernos formed in 1979. Eastern had the exclusive right to mine coal on the property. The lease was to expire in February 1991, but Eastern could extend the lease for four additional ten-year terms. Colten Company and Van Buren Minerals had a similar agreement. Van Buren is another company formed by Bernos in 1979.[2]

The Tennessee Department of Conservation, Division of Surface Mining granted Eastern two one-year permits to disturb 33 acres of the Cane property to mine underground coal. Eastern excavated a box cut on the property to mine in the Sewanee Seam, and it constructed a sediment pond, a backfill area, and roads to and from the box cut. The last permit expired in 1982.

SMCRA prohibits surface coal mining operations that will adversely affect any publicly owned park, unless it is approved by regulatory authorities. The Tennessee DSM made no explicit finding of adverse effect. Defendant contends that the first two Eastern permit applications were not subject to the adverse effects provision. According to the Government, the provision

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[2] According to plaintiff, all of the properties purchased by Cane and Colten were part of the property initially purchased by the Wyatts and included in the property Bernos contracted to purchase in 1975. Defendant contends that this fact is irrelevant.

was included in Tennessee's 1982 conditionally approved plan.

Eastern applied to DSM for a third permit in 1982. DSM denied the permit in 1984, and Eastern appealed to the Tennessee Board of Reclamation Review. The Tennessee Commissioner required Eastern to withdraw its application and submit an administratively complete application. In 1984, the Office of Surface Mining assumed federal enforcement of Tennessee's program and set forth the standards applicable in Tennessee. After that, Eastern submitted its permit application to OSM rather than to DSM.

OSM denied Eastern's permit on July 2, 1986. Its reasons for denial were excessive noise and probable hydrologic consequences. Eastern appealed the permit denial. An administrative law judge heard the appeal in June 1987. He asked OSM to make findings concerning hydrologic and noise impacts. OSM agreed to render a complete decision on adverse effects including hydrological effect and noise.

Eastern's right to extend its lease expired on August 31, 1990. Plaintiff did not extend the lease because it did not want to incur additional rent liability. Eastern believed that OSM would never grant the permit. Bernos and Eastern continued to pursue the permit application because they hoped to negotiate a lease extension with Cane. OSM denied Eastern's permit in April 1994 because Eastern had not provided certain information requested in a technical deficiency letter.

Plaintiffs' Arguments

Plaintiffs argue that:

(1) They have suffered a categorical taking, relying on the three-pronged test set forth in *Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994).* According to plaintiffs, (a) the Government has denied them economically viable use of their property; (b) they had distinct investment-backed expectations; and (c) the character of the governmental action rises to the level of a taking.

(2) Eastern and Van Buren lost their leases as a result of OSM's refusal to grant Eastern Minerals a permit to mine, and

the Wyatts' 3.5% royalty interest was rendered worthless. A taking occurred on or about August 31, 1990, when Eastern lost its right to extend its lease, because of the Government's extraordinary delay in rendering a decision on the permit application.

(3) Bernos entered into a contract to buy property from the Wyatts to profit from mining coal. Likewise, Eastern and Van Buren entered into leases with Cane and Colten solely to make a profit.

(4) The Wyatts purchased the subject property to arrange for coal mining, and reserved a royalty interest when they contracted with Bernos and Cane so that they could profit from the coal mining operations.

(5) Plaintiffs' expectations were reasonable at all times. Before SMCRA, no federal permit requirements existed. After SMCRA, expectations were reasonable because mining had occurred on the property for many years and permits had been granted. Plaintiffs' investment of funds in reliance on the permits was reasonable.

(6) Coal mining cannot be prohibited on the subject property by Tennessee's common law nuisance doctrine because mining occurred regularly from 1953 to 1981. Possible noise and lowered water quality do not qualify as nuisances.

Defendant's Arguments

Defendant argues that:

(1) Plaintiff Bernos does not have standing because none of the property interests allegedly taken was owned by Bernos on the date of taking. Additionally, the permit application that forms the basis for plaintiffs' claims was filed by Eastern Minerals and not by Bernos. Even a sole shareholder does not have standing to assert a claim in his own name for a wrong to a corporation.

(2) Plaintiffs Mary Anne Wyatt, Nancy Wyatt Zorn, and Wilson W. Wyatt, Jr. also have no standing to sue because they did not acquire their interests in the subject property until after

the alleged date of taking.

(3) Plaintiff Van Buren's claims are not ripe because it never sought a mining permit from OSM.

(4) Plaintiff Eastern Mineral's claims are only partially ripe because it applied for a permit to mine on only one of its five tracts. Eastern's failure to apply for permits to mine the other tracts renders takings claims regarding those tracts premature and that only claims relating to the lands subsumed in the 1984 permit application are ripe.

(5) Plaintiffs identify no final agency action on the alleged date of taking that could trigger a right to just compensation. Plaintiffs must base regulatory takings claims on final agency action because a claim cannot be evaluated until the agency has arrived at a definitive position regarding how to apply the regulation at issue.

(6) Two final agency actions could form the basis of a takings claim, but a claim based on either date must fail. Plaintiffs' mining application was denied in July 1986 and in April 1994. The 1986 claim is barred by the statute of limitations, and the 1994 claim deprives plaintiffs of standing because they no longer owned the lease in 1994. Plaintiffs chose neither date as the basis of their claim, but argue that the taking occurred in 1990.

(7) Delay cannot form the basis of a permanent takings claim.

(8) Plaintiffs have not shown economic impact, investment-backed expectations, or that the character of governmental action rises to the level of a taking. Because plaintiffs base their economic impact argument on extraordinary delay, plaintiffs can claim only a temporary taking. No case holds that delay can result in a permanent taking.

(9) Alternatively, plaintiffs or factors beyond government control caused any extraordinary delay.

(10) Plaintiffs' interests had no value before the governmental action; they have not suffered economic impact. The Cane property had a negative value after applying the discount rate,

and the Colten property was worth only $270,000. The Wyatt's royalty interest was worthless.

(11) Plaintiffs do not hold reasonable investment-backed expectations because the Sewanee coal seam is highly variable and unpredictable such that no one would have an expectation of profitably mining the coal on the property. Plaintiffs should have known that their mining would have adverse effects on the neighboring state park, and that plaintiffs' expectations should have been informed by SMCRA, which was enacted two years before plaintiffs obtained their interests.

(12) The character of governmental action weighs against finding a taking because OSM sought to prevent a nuisance. Plaintiffs' activities threatened to cause substantial harm in the community.

Discussion

I. Failure to State a Claim Upon Which Relief Can Be Granted

A. Standing

Only the owner of property at the time of a taking is entitled to compensation. *Dow v. United States, 357 U.S. 17, 20, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958)* (citation omitted). Plaintiff Bernos is the sole shareholder of plaintiff corporations, but he did not hold any personal interest in the leases at the time of the taking. The lease agreements were entered into between Cane Company and Eastern Minerals, and between Colten Company and Van Buren Minerals.

Bernos does not have standing via his position as president and sole shareholder of the companies. A shareholder does not have standing to assert a claim in his own name for a wrong to a corporation. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1317 (4th Cir. 1994)* (citation omitted). As this court recently noted:

> "Individuals undertake to establish separate legal entities for doing business to garner favorable consequences under federal and state tax and corporatelaw. The voluntary legal arrangements cannot be invoked for one purpose and

> disregarded for another. At least, no party has advocated a principled reason for doing so. Nor can the property transfers be deemed ministerial, matters of form, or otherwise irrelevant to a takings analysis."

Preseault v. United States, 27 Fed. Cl. 69, 88 n. 11 (1992). Plaintiff Bernos does not have standing.

The Wyatt children acquired an interest in the subject property in 1991, over a year after the alleged date of taking. As they did not own an interest on the date of taking, the Wyatt children do not have standing to sue here.

B. Ripeness

1. Eastern Minerals

Eastern's claim is based on five separate tracts of land, but it submitted a permit application for only one tract. According to defendant, this renders Eastern's claims as to the other four tracts unripe.

In cases involving a legislatively-established application process, the takings claim normally does not arise "until after a permit has been sought and denied and the effect of the denial results in economic detriment." *Conant v. United States, 12 Cl. Ct. 689, 691-92 (1987).* Plaintiffs are not required toexhaust such procedures if it would be futile to do so. *Id. at 693.*

The futility exception serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pacific v. Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990),* cert denied, *502 U.S. 943, 116 L. Ed. 2d 333, 112 S. Ct. 382 (1991).* Additional filings in this case would have been wasteful until plaintiffs knew the Government's position on the first application. Plaintiffs were not required to file additional permit applications before the Government had decided the merits of the first application.

Other proposals would have been denied by OSM. Various federal and state offices were opposed to any mining on the subject properties, and OSM's broad reading of the "adverse

effects" provision made it unlikely that Eastern would obtain a permit to mine any of the tracts.

Moreover, Eastern did not need permits for the other tracts. Most of the Sewanee coal on the property could have been reached from the single 33-acre surface mining operation covered by the one permit application. Eastern's claim is ripe for adjudication.

2. Van Buren

The Government asserts that Van Buren's claim is not ripe for adjudication because it did not submit a separate permit application. Plaintiffs argue that submitting a separate application would have been futile because Van Buren would have faced the same problems that Eastern encountered. According to plaintiff, mining the Van Buren coal after the Eastern tracts was the most profitable use of the land.

Although Van Buren may have faced the same delay Eastern endured, this is the sort of speculation that the ripeness doctrine seeks to avoid. See *Southern Pacific, 922 F.2d at 504.* Each plaintiff must satisfy the threshold requirement of a single meaningful application to maintain the futility exception. Id. We do not wish to read the meaningful proposal requirement so narrowly as to allow legal technicalities to undermine common-sense justice, but the Government was entitled to have meaningful notice of Van Buren's potential interest. Van Buren's claim is not ripe.

II. Necessity of Final Agency Action

The Government argues that a takings claim cannot be evaluated until an agency has arrived at a final position regarding how the regulation at issue will apply. See *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-91, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).* Because plaintiffs identify two final agency actions but base their claim on neither, the Government argues that plaintiffs fail to state a claim. According to defendant, if plaintiffs did base their claim on either final agency action, the claim would be barred by the statute of limitations or by the

principle that a plaintiff must own an interest in the property on the date of the taking.

Plaintiffs base their takings claim on a theory of extraordinary government delay that rendered their lease interests valueless. The Government recognizes that courts have found delay to be a basis for temporary takings, but never for a permanent taking. That no court has found a fact situation that supports such a theory does not necessarily mean that the concept does not exist. Were defendant's theory to prevail, the Government could withhold action on a permit indefinitely and avoid liability for a taking. The Government would have no incentive to consider a permit application in a timely manner.

Plaintiffs' 1984 permit application was not denied until 1994. According to plaintiffs, government delay became extraordinary in 1990. Extraordinary delay in the permit review process can result in a permanent taking without the necessity of final agency action. The delay becomes extraordinary at some point and results in a constructive permit denial that supplants final agency action. Plaintiffs have stated a claim upon which relief can be granted.[3]

III. Regulatory Takings Merits-Analysis

The Federal Circuit has adopted a two-tiered approach to analyzing takings claims. See *M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54,* cert. denied, *133 L. Ed. 2d 18, 116 S. Ct. 53 (1995).* First, we must determine whether the proscribed activity is a "stick" in plaintiffs' bundle of property rights. *Id. at 1154* (citing *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)).* If so, we consider whether the Government has interfered with the right such that it must pay compensation. Id. Considerations relevant to the second tier include the economic impact of the regulation, whether the regulation interfered with distinct

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[3] Plaintiffs base their claim on extraordinary delay beginning in 1990 rather than the 1986 permit denial, so we need not address the Government's statute of limitations argument. If the taking occurred in 1990, the claim is not barred by the statute of limitations.

investment-backed expectations, and the character of the governmental action. Id. (citing *Penn Central Transportation Co. v. New York, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)).*

A. Property Rights

Property rights are determined by state and common law. *Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726, 1996 WL 325922* * 7 (Fed. Cl. 1996) (citing *Lucas, 505 U.S. at 1030).*

The Cane and Colten leases executed in 1979 gave Eastern the right to remove "all coal and other minerals included in the Landlord's Estates, whether or not now known to exist...." According to Tennessee law, a lease conveying mineral rights provides the lessee with a real property interest in the minerals. See *Bates v. Georgia Fertilizer Co., 144 Tenn. 32, 229 S.W. 153, 157 (Tenn. 1921); Stanton v. Herbert & Sons, 141 Tenn. 440, 211 S.W. 353 (Tenn. 1919).*

Tennessee recognizes that a royalty interest is "classified as realty." *J.M. Huber Corp. v. Square Enterprises Inc., 645 S.W.2d 410, 413 (Tenn. Ct. App. 1982).* The right to receive a royalty constitutes a real property interest in the mineral estate. Id. Under Tennessee law, both Eastern Minerals and the Wyatts owned property interests.

Citing Lucas, the Government argues that plaintiffs must first establish that they had a compensable expectancy to be free of the regulatory requirements imposed on mining in order to establish a regulatory taking. According to defendant, SMCRA and longstanding Federal and State regulations preclude the possibility that the property interests could have entailed the right to be free of regulatory control. This theory was rejected in Store Safe.

Plaintiffs argue that neither SMCRA nor the pre-existing State/Federal regulatory atmosphere had any impact on their property interests. We agree. Mere awareness that Eastern's permits could be affected by future regulations does not destroy plaintiffs' property interests. Plaintiffs who choose to do

business in a heavily regulated industry do not forfeit all property interests.

The reasonableness of plaintiffs' investment backed expectations relates to whether government regulation effected a taking of their property interest rather than whether plaintiffs owned a compensable property interest. *Store Safe Redlands, 35 Fed. Cl. 726, 1996 WL 325922* *8.

B. Government Interference

1. Economic Impact

Plaintiffs argue that as a result of the Government's extraordinary delay, their lease interests were rendered valueless. Defendant contends that it is not responsible for plaintiffs' voluntary relinquishment of their leases. Plaintiffs could not be expected to have renewed the leases if they were reasonably certain that necessary permits would not be granted. Extraordinary government delay may result in a constructive permit denial. Otherwise, the Government could delay action on a permit indefinitely and the property owner would have no recourse. Plaintiffs satisfy the economic impact prong where a delay is truly extraordinary.

Eastern resubmitted its permit application to OSM in October 1984. In December, OSM informed Bernos that Eastern's permit application was deficient. In March 1985, OSM told Eastern that its application was administratively complete, but that a permit would not be issued if the mining operation would adversely affect the park.

OSM sent Eastern a technical deficiency letter in May 1985. Eastern responded on June 25. An OSM official anticipated that a permit would be issued by November 1, and he requested a compliance review.

In December 1985, OSM asked for additional technical information. Rather than responding formally, Eastern applied to OSM for funds under the Small Operator Assistance

Program.[4] Under that program, OSM conducts necessary drilling and testing for small operators.

Several Tennessee agencies and one Federal agency expressed concerns regarding plaintiffs' proposed operations. An employee's note to the file referenced state opposition and lack of additional technical information necessary to grant the permit. OSM denied Eastern's permit on July 2, 1986. Eastern appealed on July 30. An administrative law judge heard the appeal in June 1987, and directed OSM to inform Eastern of any additional information it needed to decide the permit application. In February 1988, OSM issued a technical deficiency letter. Plaintiffs reapplied for SOAP funds.

In 1988 and 1989, OSM suspended plaintiffs' application for SOAP funds several times. By late 1989, OSM lifted the suspension and began developing the SOAP project. SOAP engaged a consulting group to conduct tests and prepare a report for OSM.

The consulting group issued a preliminary report in December 1989. OSM rejected the report because it believed that the report was flawed. OSM spent the next several years attempting to develop specifications for a project that would produce the hydrologic and geologic information needed for Eastern's permit application.

In October 1990, two months after plaintiffs' right to extend the leases expired, OSM determined that it was necessary to conduct a fracture analysis on plaintiffs' property, and it received a bid for the work. A final report on the fracture analysis was submitted to OSM in February 1992, but OSM did not accept the results of this test. A year and a half later, OSM sent Eastern a third technical deficiency letter.

In 1991, the parties filed a joint request with the

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[4] The Government argued that plaintiffs were not eligible for SOAP funds because they planned to mine more than the maximum allowed. If plaintiffs had mined more than the maximum amount, the only sanction would have been reimbursement of the SOAP funds.

Administrative Law Judge for a consent decision. The motion noted that "the permit denial of July 2, 1986 has been effectively withdrawn . . . all that remains is OSM's review of EMC Permit Application. . . ." The administrative law judge issued a consent decision incorporating the motion. At the time, OSM was still reviewing the Eastern application that it received in 1984.

Plaintiffs' right to extend the leases expired on August 31, 1990. Plaintiffs did not extend the lease because they did not want to incur rent liability; it seemed to them that OSM would never grant the permit. After their right to extend the lease expired, Bernos and Eastern continued to pursue the permit application in hopes that they could negotiate a new lease with Cane. In April 1994, OSM denied Eastern's permit because it had not provided the information requested in the third technical deficiency letter.

The Government delayed consideration of plaintiffs' permit application for an extraordinary length of time. Plaintiffs relinquished their lease interests because they believed the permits would never be granted and could not afford to incur rent liability in the mere hope that the Government would act. We determined at trial that the Government had no intention of ever granting the permit. The fact that the leases were relinquished voluntarily may affect our calculation of just compensation, but it does not deprive plaintiffs of the necessary showing of economic impact.

2. Investment-Backed Expectations

Plaintiffs must show that they took an interest in the property "in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies, 28 F.3d at 1177.* One who obtains an interest in property with knowledge of a restraint does not have a reliance interest and has assumed the risk of economic loss. *Id.*

Plaintiffs obtained the leases in 1979, two years after SMCRA was enacted. They obtained two permits during the interim

phase of SMCRA in 1980 and 1981.[5] The Government argues that the provision that prohibits any adverse effects on public parks did not apply when those permits were issued, but that plaintiffs should have known that the provision eventually would be enforced. Thus, they are deprived of investment-backed expectations.

The adverse effects provision was enforced during the interim phase of SMCRA. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).* In Hodel, the Court noted that provisions of SMCRA, including the adverse effects provision, are effective during the interim period on their own terms. *Id. at 269 & n.2.*

Tennessee's 1982 conditionally approved permanent regulatory program expanded the definition of adverse effect. Plaintiffs' permit was denied in 1986 after the Office of Surface Mining assumed direct federal enforcement of Tennessee's program. Plaintiffs leased the property in reliance on a state of affairs that did not include the definition of adverse effect that formed the basis of the permit denial. Plaintiffs reasonably relied on the two permits they received under SMCRA when they invested in the property.

Defendant argues that the Sewanee coal seam is so highly variable and unpredictable that plaintiffs' expectation of profit was unreasonable. At the same time, it emphasizes that Wyatt sold the Cane property for more than $5 million and that Bernos sold his mineral interest in the Colten property for $ 2.5 million. We assume that these market prices accurately reflect value. Evidence at trial showed that plaintiffs were not unreasonable in expecting that the subject land contained coal and that coal exploration would be profitable. Plaintiffs' investment in the box cut and other activities with the expectation of gaining

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[5] SMCRA was implemented in an interim and a permanent phase. The interim program mandated enforcement of only some of the Act's provisions whereas during the permanent phase, a regulatory program mandating compliance with all of the federal standards was adopted for each state.

profit was reasonable.

3. Character of Governmental Action

This prong of the regulatory takings analysis addresses the degree and result of a regulation. Plaintiffs must show that "the government action went beyond the type of government land-use regulation that is a cost all citizens must pay for living in organized society." *Bowles v. United States, 23 Cl. Ct. 443, 446-47 (1991)* (citing *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415-16, 67 L. Ed. 322, 43 S. Ct. 158 (1922)).* This inquiry:

> "examines the challenged restraint under the lens of state nuisance law. If the regulation prevents what would or legally could have been a nuisance, then no taking occurred. The state merely acted to protect the public under its inherent police powers."

Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994).

To show that plaintiffs' planned activities are prohibited under the state's common law nuisance doctrine, the Government must "identify background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found." *Lucas, 505 U.S. at 1031.*

A per se nuisance is one in which the injury is certain rather than speculative. *State v. Feezell, 218 Tenn. 17, 400 S.W.2d 716, 719 (1966).* "Where injury from a nuisance is not real and immediate and certain to occur, but only uncertain or contingent, the nuisance will not be enjoined anticipatory to its going into operation." Id. Coal mining is not a per se nuisance, and the Government did not show that injury to property from plaintiffs' activities was certain.

Coal has been mined on the Wyatt's property since at least 1954. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition." *Lucas, 505 U.S. at 1031.*

Coal mining may constitute a nuisance in certain

circumstances, but the Government presented no convincing evidence that plaintiffs' proposed activities would constitute a nuisance. Defendant argues that OSM prevented the proposed mining operation from causing "nuisance-like" impacts upon a nearby state park from water pollution and noise. According to defendant, plaintiffs' mining operation threatened to cause substantial harm in the community and to endanger public health and safety. It cites various statutes that identify pollution and noise as nuisances under Tennessee law. In fact, neither the noise nor the hydrology concerns that OSM raised constituted a nuisance.

Tennessee granted permits to mine in 1980 and 1981. The State was not concerned with potential nuisance problems. Plaintiffs' 1984 permit was denied on the basis of "adverse effects." These adverse effects never were proven and cannot form the basis for a nuisance exception to takings law.

Conclusion

The claims of plaintiffs Bernos, Van Buren Minerals, Mary Anne Wyatt, Nancy Wyatt Zorn, and Wilson W. Wyatt, Jr., are dismissed for the reasons stated. The property interests of plaintiffs Eastern Minerals International, Wilson W. Wyatt, Sr., and Anne D. Wyatt were rendered valueless through extraordinary delay by the United States in acting on their permit requests. The parties will agree on an appropriate valuation for the property taken and notify the court no later than November 1. We are available at any time to assist counsel in determining damages if necessary.

Robert H. Hodges, Jr. Judge

Appendix C – – Opinion and Order of the United States Court of Federal Claims Dated and Filed November 25, 1997

EASTERN MINERALS INTERNATIONAL, INC., et al., Plaintiffs, v.UNITED STATES OF AMERICA, Defendant.

No. 94-1098 L

UNITED STATES COURT OF FEDERAL CLAIMS

39 Fed. Cl. 621; 1997 U.S. Claims LEXIS 271; 140 Oil & GasRep. 59

November 25, 1997, Filed

COUNSEL: Raymond D. Battocchi, John R. Powell, McLean, Virginia, for plaintiffs.

Marc A. Smith, United States Department of Justice, Washington, D.C., for defendant.

OPINIONBY: Robert H. Hodges, Jr.

OPINION: OPINION & ORDER, HODGES, Judge.

This case involves a taking by the United States of plaintiffs' right to mine coal in Tennessee. After plaintiffs made substantial investments in a mineral lease and in preparing the land, the Government destroyed the fruits of those investments by purposely delaying action on plaintiffs' application until after their lease expired. The United States took plaintiffs' right to mine coal and their right to renew the mining lease.

We dismissed the claims of plaintiffs Milton Bernos Sr., Van Buren Minerals, Mary Ann Wyatt, Nancy Wyatt Zorn, and Wilson W. Wyatt, Jr. See *Eastern Minerals International, Inc. v. United States, 36 Fed. Cl. 541 (1996).* Van Buren's claim is not ripe for adjudication, so the value of the coal seams on the Colten property is not included in our damages valuation. *Id. at 548.* We enter judgment for plaintiffs Wilson W. Wyatt, Sr., Anne D. Wyatt, and Eastern Minerals International, Inc.

Facts

Cane Tennessee, Inc. bought the property at issue from Wilson W. Wyatt, Sr., and Anne D. Wyatt in 1979. The Wyatts retained a 3.5% mineral royalty interest. Cane leased the property in 1979 to Eastern Minerals International, Inc., a company formed by Milton Bernos, Jr. Eastern had the exclusive right to mine coal on the property. The lease was to expire in February 1991, but Eastern had the right to extend the lease for four additional ten-year terms. The right to extend the lease expired in August 1990.

The Tennessee Department of Conservation, Division of Surface Mining, granted Eastern two one-year permits in 1980 and 1981 to disturb 33 acres of the Cane property to mine the Sewanee seam. Eastern excavated a box cut on the property and constructed a sediment pond, a backfill area, and roads to and from the box cut.

Eastern applied for a third permit in 1982, and Tennessee denied the permit in May 1984. Pursuant to a consent order before the Tennessee Board of Reclamation Review, Eastern withdrew its application. The United States Office of Surface Mining (OSM) assumed federal enforcement of Tennessee's program in late 1984. Eastern then submitted its permit application to OSM rather than to the state agency.

OSM's standard practice was to respond promptly when it received a permit application. The first step in the application review process was to determine whether the applications were administratively complete. Most applications contained errors, so OSM dealt with deficiencies on a regular basis. Despite this practice, OSM required six months to determine that Eastern's application was administratively complete.

OSM sent two technical deficiency letters to Eastern in 1985. In response, Eastern applied to OSM for monetary assistance in obtaining the required information. The application for assistance was placed on hold because OSM was planning to deny the permit.

OSM denied Eastern's permit in July 1986, ostensibly because

the noise of the mine could have an adverse impact on a nearby state park. This was Tennessee's concern, not OSM's. Eastern appealed the permit denial. The administrative law judge who heard the appeal in June 1987 was not impressed by OSM's noise allegations. OSM raised hydrological concerns in the permit denial letter, but lacked data to support them. Because the judge did not want to resolve the case "piecemeal," he asked OSM to make findings concerning the alleged hydrological impacts. He directed OSM to inform plaintiffs promptly what hydrological information it needed. OSM consumed four years pursuing that information.

Eastern's right to extend its lease expired on August 31, 1990. It did not extend the lease because it believed that OSM would never grant the permit. In fact, OSM never would have granted the permit. The Government would not have approved the coal mine because Tennessee did not want it near a state park.

Unreasonable Delay in Denial

The Tennessee Wildlife Resources Agency expressed opposition to the Eastern Minerals permit in 1984.[1] The State felt that the mine would have adverse impacts on Fall Creek Falls State Park and on the recreation, hunting, and fishing experiences of visitors to the park. Because the State had joint reviewing authority for the permit under the applicable regulations, Eastern's permit would not be granted if the State objected.[2]

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[1] "Because the [Department of Conservation] is concerned with maintaining the aesthetic and environmental integrity of the Park . . . we would recommend that mining regulatory authorities (DSM or OSM) deny any request to mine this site."; See also Defendant's Exhibit 194 ("Our [Tennessee's] position remains that the permit be denied.")

[2] The State's opposition continued throughout the permit application process. The Commissioner of the Tennessee Department of Conservation wrote Mr. Bernos in 1989, pointing out that the department had opposed Eastern's permit in writing five separate

(continued...)

Eastern sought aid from OSM in obtaining the information that the agency was requiring. The Small Operator Assistance Program (SOAP) was available to provide such assistance. Before the SOAP program could begin studies to provide the necessary hydrological information, the SOAP application was placed on hold and then denied when OSM denied Eastern's permit in 1986. The permit was denied before SOAP studies could be commissioned to provide information. OSM's standard practice was to make a technical decision only after it had received all the information it needed.

An internal OSM memorandum dated July 1985 states that because OSM did not have a strong defense to points raised by Eastern in its response to a technical deficiency letter, OSM "would have to hang [its'] hat[] elsewhere."[3] OSM denied Eastern's application in 1986, for adverse noise impact on Fall Creek Falls State Park. An administrative law judge ruled that the 1986 denial of the permit was premature because OSM did not have all the information necessary regarding the hydrological impact question. OSM requested additional information from Eastern to supplement the hydrological impact information.

After appeal of the permit denial, the SOAP process began again. In May 1988, an OSM attorney placed the SOAP application on hold because of an outstanding reclamation order on the Eastern box cut. This reclamation order and an accompanying cessation order had been issued in 1986 when the permit was denied by OSM. Despite the appeal before the Office of Hearings and Appeals, OSM used the reclamation order as a reason for delaying the SOAP application. In September 1988, the SOAP study was placed on hold, this time

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...continued)
times. Despite the studies being conducted, the Commissioner concluded by stating that "the department must continue its stated opposition to any proposed mining in this area."

[3] In other words, in order to stop this project, OSM would have to find another basis for denying the permit.

to determine if the study would be worth the expense. The SOAP study was placed on hold yet again in May 1989 due to another outstanding reclamation order. The issues were resolved and the SOAP process resumed.

SOAP personnel and OSM permitting personnel collaborated to determine what studies were necessary to satisfy the hydrological impact question. Despite close coordination between the two, the Permitting Division said that it was not satisfied with SOAP's report. In late summer 1990, OSM rejected the SOAP report and laid out a new multi-phase approach to the collection of SOAP data.

OSM concluded that further studies should be undertaken because the first SOAP study had not been conclusive as to hydrological impact. An internal memorandum outlined plans for further testing: "If, after collection of Phase II and Phase III data, no impact to the hydrologic balance can be documented, additional [testing] wells should be installed . . . ." OSM's policy was to stop Eastern's development without taking a final action that plaintiff could appeal. OSM abandoned the original approach in favor of an eight-step approach outlined in the internal memorandum cited above. Before any steps could be taken to implement the new approach, still another approach was developed requiring a lineament study.[4] OSM requested further studies and created further delays. These requests continued until the permit was finally denied in 1994. By then, Eastern had lost its lease.

War of Attrition

The Government waged a war of attrition against Eastern. Eastern could not afford to retain an expensive leasehold when it knew that state and federal authorities would never renew its permit. The Fifth Amendment does not permit the Government to avoid liability for a taking merely because it has the resources

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[4] The lineament study was designed to produce a map and report detailing linear surface features on the Colten property in order to estimate underground formations and groundwater conduits. The study was completed in 1991.

to outlast a property owner. Equity is the compelling force driving just compensation under the Fifth Amendment. As defendant noted in its brief, the search for fairness and justice guides regulatory takings.

The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *U.S. v. Dickinson, 331 U.S. 745, 748, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947)* (citing *Davis v. Mills, 194 U.S. 451, 457, 48 L. Ed. 1067, 24 S. Ct. 692 (1904))*. The Fifth Amendment "expresses a principle of fairness and not a technical rule of procedure . . . ." *Pleasant Country Ltd. v. United States, 37 Fed. Cl. 321, 328 (Fed. Cl. 1997)* (citing *United States v. Dickinson, 331 U.S. 745, 748, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947))*. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness * * * as * * * [it] does from technical concepts of property law." *Georgia-Pacific Corporation v. United States, 226 Ct. Cl. 95, 640 F.2d 328, 336 (Ct. Cl. 1980)* (citing *United States v. Fuller, 409 U.S. 488, 490, 35 L. Ed. 2d 16, 93 S. Ct. 801 (1973))*. "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity,' . . . ." *United States v. Commodities Trading Corp. 339 U.S. 121, 124, 94 L. Ed. 707, 70 S. Ct. 547 (1950)*.

At trial it was clear that OSM, based in large part on Tennessee's opposition, had no intention of allowing mining next to the park. The testing conducted after the administrative law judge's decision was not going to satisfy the Tennessee Wildlife Resources Agency that the mine was not a danger to the scenic and ecological resources of the park. When the Permitting Division requested even more testing and proposed a new multi-phased approach, the delay became unreasonable. The Permitting Division knew that Tennessee opposed the mine, and further delay in making the decision was unnecessary and unjustifiable.

The Government requisitioned Eastern's right to mine the Cane property and its right to renew the lease. Both are property interests for which Eastern is entitled to just compensation.

Just Compensation

The Government denied Eastern's permit because of the State's concerns that the proposed activities would have adverse effects on a public park. Plaintiffs are not required to bear the burden of this public benefit.

The standard measure of just compensation in a permanent taking situation is the value of the property on the date of the taking. *First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 320, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).* Courts should not "reduce the concept of 'just compensation' to a formula," or "make a fetish even of market value, since it may not be the best measure of value in some cases." *United States v. Cors, 337 U.S. 325, 332, 93 L. Ed. 1392, 69 S. Ct. 1086 (1949).* "Both fairness and equity must be considered in awarding compensation . . . ." *Yaist v. United States, 17 Cl. Ct. 246, 257 (1989).*

The loss of a contractual right to renew a lease is considered to be a taking of property for Fifth Amendment purposes. *United States v. Petty Motor Co., 327 U.S. 372, 90 L. Ed. 729, 66 S. Ct. 596 (1946).* In a World War II condemnation action, the Supreme Court stated that the value of a tenant's leasehold interest included a contractual right to renew the lease. *Id. at 381.* The Government condemned the building in 1942 for a three year period, with the option to terminate possession in June 1943 and June 1945. *Id. at 374.* Plaintiff Petty Motors Company's lease expired in October 1943, with an option to extend for an additional year. *Id. at 375.* The Court did not require the plaintiff to exercise the option in the hopes that the Government would terminate possession before 1945. Instead, it stated that Petty Motors' damages would be the term of the original lease plus the one year renewal term. *Id. at 381.*

The Government prevented Eastern both from obtaining the benefit of its leasehold interest and from renewing its lease. If a permit had been granted before August 1990, Eastern would have extended the lease for as long as necessary to mine all the merchantable coal in the ground.

The traditional method of determining just compensation is to

use comparable sales to arrive at fair market value. *Whitney Benefits v. United States, 18 Cl. Ct. 394, 408 (1989).* When comparable sales data are unavailable, a cash flow analysis is an acceptable alternative. Id. The Claims Court in Whitney noted that the value of coal reserves "can only be measured by their ability to produce income." *Id. at 409.* Both parties' experts agree that a discounted cash flow analysis is the best approximation of the value of the property. This method produces a value for property based on the income stream the property will produce. A discount rate is applied to the income stream in order to produce a present value for the property as of the date of the taking. The discount rate represents the rate of return an investor would require in order to risk capital on the project. The rate is a combination of the time value of money and the risk involved in the transaction..[5]

Expert Reports

Experts for plaintiffs and defendant presented their evaluations of the value of the Cane leasehold held by Eastern, and the royalty interest retained by the Wyatts. Plaintiffs' experts produced a fair market value for the Eastern-Cane lease in 1990 of $31,359,822. The fair market value of the Wyatts' 3.5% royalty interest was $5,887,611.Discount rates normally include a factor for inflation. Both experts used constant dollars in their analysis, so no inflation factor is included in our discount rate.[6] The Government's experts concluded that the underground minable coal on the Cane property was worth negative $9.7 million, and the surface minable coal as negative $945,000. They valued the Wyatt's royalty interest at $0.

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[5] Discount rates normally include a factor for inflation. Both experts used constant dollars in their analysis, so no inflation factor is included in our discount rate.

[6] Plaintiffs' valuation has been reduced because of a stipulated interpretation of the Cane- Eastern lease. Eastern Minerals is responsible for paying the Wyatt's royalty interest under the stipulation, reducing the fair market value of the lease to $26,346,299. The Wyatt's interest remains at $5,887,611.

The Government's experts were not persuasive for the most part. The testimony and conclusions of one expert clearly were designed to mesh with the Government's legal theories. His refusal to acknowledge input from counsel in reaching his conclusions was not credible.[7] An expert should not be an advocate. The Government's other expert estimated capital costs based on a purchase of real estate at three times the current fair market value. Plaintiffs' expert testimony generally was more credible.[8]

Coal Reserves

Plaintiffs' experts estimated the minable coal reserves in the Sewanee seam on the Cane property to be 16,673,629 tons. The Government's experts estimated 20,693,000 tons. Although the two approaches differed a great deal in methodology, the results were fairly consistent. The isopach method used by plaintiffs' experts traces and recognizes trends in the coal seam by providing a weighted average of thickness. This method is accepted in the field for coal reserve evaluations.

The Government's experts also analyzed the reserves according to the isopach method. They prepared an isopach map of the Sewanee seam, but it was destroyed before trial. That map would have been favorable to plaintiffs' case.

The government expert switched to the unweighted average method for use at trial. This method estimated greater resources than the isopach method, but it assumed a greater variability in

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[7] The Government moved to reconsider these conclusions because (it argued) they are not supported by the record. A trial court has broad discretion to assess credibility because testimony may be judged on demeanor and bearing of witnesses during trial; such determinations and inferences often are not conveyed by words in a transcript.

[8] Defendant notes in its motion for reconsideration that the court accepted the Government's expert testimony concerning discount rate and other factors. It asserts that we must believe all of a government expert's testimony if we accept any of it. We are not aware of any principle that requires such a result.

the thickness of the coal seam. This led defendant to the conclusion that huge quantities of rock would have had to be mined to recover an adequate amount of coal. This would have meant higher production costs and loss of efficiency by the mining teams. The plaintiffs' estimation of coal reserves and the variability in the Sewanee seam was more credible, especially in light of defendant's actions regarding the destroyed map.

Extraction Rate

The Cane-Eastern Minerals lease requires that, "in connection with any mining activity of Tenant [Eastern], other than strip-mining, Tenant shall take all action necessary to support the surface of the land." Eastern therefore had a duty to prevent subsidence of the Cane property through its operations. Both parties' experts agree that a 50% removal rate would prevent subsidence. For all areas except those under Cane Creek, we employed a 50% removal rate. The experts do not agree that Eastern could have mined under Cane Creek. Defendant's expert projected no mining at all under and within 100 feet of the creek because he expected to encounter poor roof conditions and water problems. Plaintiffs assumed a 45% recovery rate for the reserves located under Cane Creek. The 45% recovery rate is consistent with both experts' opinions of surface integrity. We used the 45% rate for areas under and within 100 feet of Cane Creek.

The 50% recovery rate is applied to a total available reserve of 15,916,461, producing 7,958,230 recoverable tons. The 45% recovery rate applies to a total reserve of 757,168, producing 340,724 tons of raw coal. This results in 8,298,954 recoverable tons from the Cane property. We did not include the Sewanee seam coal located near Brock Ridge because plaintiffs indicated that such reserves were inferred. Inferred reserves means that the geologist has a low level of confidence in finding the reserves as marked on the isopach map. This low level of confidence, combined with the lack of a mine plan for that area led us to exclude those reserves from plaintiffs' estimate.

The profitability of the operation and the life of the mine depend on the price set for coal, the discount rate to be applied,

the productivity of the miners, and the capital costs. These factors are addressed below.

Coal Price

The experts presented an approximation of the price for coal over the life of the mine. Plaintiffs used the average spot price of coal at the Widow's Creek power plant for the years 1989 and 1990 to reach an estimate over the life of the mine. Their expert testified that the spot price was more susceptible to changes in supply and demand than were long-term contract prices. However, he felt that the spot prices for 1990 were a better indicator of coal price than the long-term contract prices. The average long-term contract price would contain prices from contracts entered long before 1990 and therefore would not be as indicative of coal value in 1990.

A government expert performed a historical and geographic analysis of coal prices in the United States as well as in Tennessee. He compared prices of the various available consumers of Eastern's coal. Based on the quality of the coal, he assumed that 90% of Eastern's production would be lower-price utility coal and 10% would be higher price stoker coal. His long-term sales contract estimate for utility coal was $31.00 per ton free on board (FOB) shipping point. Long-term contracts for higher-quality stoker coal would bring $34.00 per ton FOB shipping point, according to defendant.

Plaintiffs' experts were more persuasive on this point. The best estimate of the value of the coal in 1990 is the average spot price in 1990. Plaintiffs utilized that price across the life of the mine, in essence transforming it into a long-term price for the coal. Plaintiffs' converted long-term contract price for 1990 was $35.19 per ton FOB shipping point. This price provides a better estimate of coal prices in 1990.

Discount Rate

In preparing a cash flow analysis, a discount rate is employed to take account of risk and to convert the future income stream to present value. Plaintiffs used a 10% discount rate based in part on a Bureau of Land Management (BLM) circular

published in 1986 for the appraisal of federal coal property. The BLM publication advises that the 10% discount rate assumes a normal debt-equity mix in the capital required for the project. The publication advises against adjusting the discount rate to account for risk because the selection of a risk premium for this purpose is highly subjective. Instead, it provides four alternatives to account for the uncertainty: (1) probability weighted scenarios; (2) sensitivity analysis of input; (3) discount value based on subjective criteria linked to likelihood of property development; (4) timing development variation.

Plaintiffs' expert did not utilize any of these methods to account for uncertainties in property development. He testified that a basis for his ten percent figure was a report in another case before this court, *Whitney Benefits v. United States, 18 Cl. Ct. 394 (1989).* That report incorporated a sensitivity analysis that imposed an additional risk factor on the cash flow. He did not perform such a risk analysis for this case. The risk analysis in Whitney Benefits was used to account for the risk inherent in that project because the project required the plaintiff to change the course of a river.

Plaintiffs' ten percent rate is consistent with the BLM standard. There are two problems with this figure, however. While they claimed to have taken account of risk in applying the ten percent rate, neither the expert's report nor his testimony give any indication of the manner in which the ten percent discount rate approximates the risk of an undeveloped property. He stated that he uses the ten percent rate in 89% of his cases, but did not explain the circumstances under which he normally applies that rate.

Defendant's expert chose a fifteen percent discount rate for his cash flow analysis. He stated that applying a fifteen to twenty percent rate to undeveloped properties is standard in the field. He also stated that ten percent would be appropriate for a developed property. Because the Cane property was essentially undeveloped, the higher discount rate would apply. His rate took into account extensive exploration of the property, nearby productive mines in the same seam, and quality of the Sewanee coal. This figure is supported by adequate explanation and will

be used in discounting the income stream of the Cane property.

We could not determine how the Government arrived at the discount factors listed at the bottom of Table III of its expert report. We applied the formula for present value:

PV = Cash Flow/(1 + discount rate)<time>

This formula did not reproduce the Government's figures. A standard annuity table using a 15% rate of return matched the figures reached with the above formula.[9] We substituted the annuity table figures for the discount factors in defendant's report.

Production

The productivity of the mine and the amount of clean coal produced affect the income stream. Both experts presented rates of productivity of clean, marketable coal. Plaintiffs' expert had experience in assessing coal properties along the Appalachian corridor. Defendant's expert also had experience in Appalachian coal. We accepted plaintiffs' estimation of the productivity of the coal mining sections and the estimation of the capital resources (shuttle cars, continuous miners, roof bolters, and belt feeders) necessary to achieve that level of production because his explanation for the estimates was more credible.

The Government's plan called for building a washing facility prior to the start of production. This plan created a two-year delay in the start of mining and required huge capital expenditures prior to revenue production. The Government's expert included in this portion of the plan the purchase of property for the washing plant at three times the fair market

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[9] CHARLES H. GUSHEE, ed., FINANCIAL COMPOUND INTEREST AND ANNUITY TABLES 734 (5th ed. 1972). The discount figures for the nine year life of the mine are as follows:

Year 1 - .869
Year 2 - .756
Year 3 - .657
Year 4 - .571
Year 5 - .497
Year 6 - .432
Year 7 - .375
Year 8 - .326
Year 9 - .284

value.

Plaintiffs' expert assumed that Eastern would wash its coal at the nearby Tennessee Consolidated coal-washing plant. We determined that Tennessee Consolidated had excess capacity at its washing plant, and that plaintiffs' assumptions were entirely reasonable. The Government's experts created delay and unnecessary capital expenditures by planning for the construction of a new coal-washing plant. Even if coal-washing at Tennessee Consolidated were to become impractical at some point during the life of the mine, the delay and capital required would be spread over a period when the mine was already in production. Plaintiffs' estimates of clean coal production from the washing facility was more reasonable and credible.

The construction of a coal-washing plant would cause a two-year delay in coal production. In a discounted cash flow analysis, the income stream in the first few years is worth more than in later years. This is because money earned in the future is worth less than money earned in the present or immediate future. The discount rate accounts for risk but also for the time value of money, so that a dollar earned in the first year of the mine has a higher present value than a dollar earned in the eighth year of the mine. In defendant's plan, the most profitable years in the analysis are consumed by large capital outlays and no revenue income. Plaintiffs proposed to usean existing, nearby coal-washing facility. This was a reasonable assumption that allowed them to move into production in the first year of the mine.

Capital Costs

The parties' experts did not agree on how to treat the capital required to mine the Sewanee seam. Plaintiffs amortized the capital over the life of the mine. The Government expensed capital costs in the year incurred, greatly reducing the cash flow in the initial years when 1990 dollars were worth the most.

The Department of the Interior circular that plaintiffs relied upon, expensed capital costs in the year they are incurred. The Claims Court in the Whitney Benefits case, relying on the same circular, also expensed capital costs in the year they were

incurred. *Whitney Benefits, 18 Cl. Ct. at 417.* Plaintiffs relied on both the circular and Whitney Benefits in its cash flow analysis. Because plaintiffs provided no rational explanation for its departure from the method used in these two sources, we expensed capital costs in the year incurred.

Plaintiffs' expert provided an annual breakdown of capital costs, but did not use the breakdown because it had amortized the capital expenses over the life of the mine. The Government expert did expense capital costs in the year incurred, so we will utilize that breakdown in estimating capital costs and in expensing capital costs in the year incurred. The figures in defendant's tables are adjusted to avoid the need for a coal-washing plant and related equipment.[10]

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[10] We found at trial that plaintiffs were reasonable in assuming that coal could be washed at the Tennessee Consolidated facility. Plaintiffs' estimates of necessary equipment were more reasonable than the Government's. Defendant and plaintiffs included the excavation and use of a second box cut to reach the mine face later in the life of the mine. Plaintiffs' cost estimate for the second project was not reasonable. We included defendant's estimated capital costs for the second box cut. We removed from defendant's breakdown of capital costs (Appendix 3, Micon Report) the following capital required for the preparation plant and for the belt feeders that we found not to be necessary:

1989: 1) land acquisition ($50,000)
1990: 1) land acquisition ($150,000)
2) coarse refuse site ($181,000)
3) fine refuse slurry dam ($475,000)
4) prep plant site grading ($72,000)
5) prep plant construction ($2,400,000)
6) plant sub station ($75,000)
7) plant office ($35,000)
8) refuse conveyor ($125,000)
9) belt feeder ($150,000)
1991: 1) plant feed dozer ($265,000)
2) D7H for refuse ($260,000)
3) belt feeder ($150,000)
1997: 1) belt feeder ($150,00)

(continued...)

Wyatts' Royalty Interest

The Wyatts' royalty interest is described in the Cane lease as three and one-half percent of gross sales price. The lease defines gross sales price as "an amount equal to the total gross proceeds payable to Grantee . . . from the sale of coal mined and removed . . . FOB railroad car . . . and FOB truck." As noted above, we accept plaintiffs' long term price for the Sewanee coal as of 1990. We also accept plaintiffs' price per ton of $31.91 in their revised Table 3 for calculation of the Wyatts' interest.

Defendant argued both at trial and for reconsideration that the Wyatt's royalty income in this analysis should be reduced by the applicable tax rate. The lump sum payment to the Wyatts is in

---

(. . . continued)
1998: 1) belt feeder ($150,000)

We also made adjustments to Appendix 3 to defendant's expert report to reflect the investment required for continuous miners and roof bolters under plaintiffs' mine plan. The following amounts were substituted in the years indicated as the capital requirements for underground equipment:

1990: Continuous miners (2) - $1,850,000
Shuttle cars (4) - $651,000
Roof bolters (4) - $651,000
1991: Continuous miners, roof bolters, and shuttle cars should be $0 because all initial equipment was purchased in 1990.
1997: Continuous miners (2) - $1,850,000
Shuttle cars (4) - $651,000

Roof bolters (4) - $651,000

We adjusted defendant's capital layout in Appendix 3 to account for the reduced life of the mine. With the available resources, the mine will operate for only nine years. Defendant's mine plan did not begin production until 1991 and the reduced life of the mine would end at 1999 under defendant's schedule. Therefore, the capital expenses included in defendant's report after 1999 are disregarded. We also adjusted the layout to account for plaintiffs' assumption that mining will begin in the first year of the mine. All 1989 and 1990 capital expenditures in defendant's tables are moved to 1991.

lieu of the income stream the mine would have generated. This lump sum will be taxed as a capital gain.

The Government makes the new argument from a new expert on reconsideration that the Wyatts can roll these proceeds into similar investment property within two, years and avoid the capital gains tax. We noted two problems with the new expert's declaration. First, a rollover merely postpones the Wyatts tax liability; it does not relieve them of the obligation to pay the tax. Deferral of this tax may provide a benefit to the Wyatts, but that is not a sufficient reason essentially to tax them twice on the same award. Second, the fact that Mr. Hufendick located a method by which the Wyatts could avoid this tax liability does not mean that the Wyatts would choose such an option.

Conclusion

We accept plaintiffs' estimations of coal reserves, productivity, and projected capital expenditures. We find that expensing the capital required for the project in the year incurred is the appropriate method. We adopt defendant's suggested discount rate. Discount factors for a 15% rate are taken from the annuity tables. The rate of recovery of coal reserves is adjusted to 50% for most of the reserves and 45% for the reserves under or within 100 feet of Cane Creek. The reduction in the recovery rate reduces the life of the mine to nine years. We concluded that plaintiffs' mine plan provided for production in Year One of 387,507 clean tons. The mine produced 778,216 clean tons per year in Years Two through Eight. In Year Nine, 714,292 clean tons of coal would be recovered prior to the depletion of the estimated reserves.

The present discounted value of Eastern Minerals' leasehold and renewal right is $15,866,311.[11] The present discounted

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[11] For each of the nine years of the mine, we reduced the gross profit by the capital expenditures incurred in that year. We also reduced the profit by the appropriate depletion allowance of 10% of gross income (exclusive of rents and royalties) not to exceed 50% of taxable income pursuant to *26 U.S.C.A. § 613* (1997 Supp.). We (continued...)

value of the Wyatts' royalty interest is $3,743,766.[12]

The Clerk will enter judgment for Eastern Minerals International, Inc. for the sum of $15,866,311 and for Wilson W. Wyatt, Sr., and Anne D. Wyatt in the amount of $3,743,766 plus compound interest at the tax overpayment rate.[13] We noted in the April 21, 1997 opinion that no costs should be awarded. We referred to costs as taxed by the Clerk of Court pursuant to RCFC 77.4. We did not intend to limit plaintiffs'

(...continued)
applied an effective corporate tax rate of 38% to arrive at net profit. We added the depletion allowance to the net profit to arrive at a cash flow that was discounted by the appropriate discount factor. We added all the discounted cash flow figures to arrive at the net present value of Eastern Minerals leasehold and renewal interest.

[12] We used the clean tons produced each year and the $31.91 per ton figure discussed supra to arrive at the gross revenue figure for the Wyatts' royalty interest. We then calculated 3.5% of each year's gross revenues. We discounted the royalty figure by the appropriate discount factor for a 15% discount rate. The Wyatts' royalty interest is subject to the same risk and time value of money concerns to which Eastern's interest is subject. Therefore, we chose the same discount rate as that applied to the Eastern cash flow.

[13] Plaintiffs requested on reconsideration that we award interest on the judgment. We agree that plaintiffs are entitled to compound interest at the tax overpayment rate. Defendant argues that plaintiffs are entitled only to simple interest at the rate specified in the Declaration of Takings Act. *40 U.S.C.A. § 258A,* et seq. The Declaration of Takings Act on which defendant relies for application of the 52-week T-bill rate calls for compound interest. Compound interest is appropriate because (1) the case involves commercial property for which plaintiffs expected a good return on their investment; and (2) plaintiff's have suffered a long period of delay between the taking and judgment. See *Whitney Benefits, Inc. v. U.S., 30 Fed. Cl. 411 (1994).*

Interest at the tax overpayment rate is appropriate. This rate has been approved by the Federal Circuit. *Hughes Aircraft v. U.S., 86 F.3d 1566 (Fed. Cir. 1996),* vacated and remanded on other grounds, *U.S. , 117 S. Ct. 1466 (1997).*

rights to obtain costs pursuant to other statutory authority. See *42 U.S.C.A. § 4254*(c).

Robert H. Hodges, Jr., Judge

Appendix D – – Judgment of the United States Court of Federal Claims Dated and Filed December 22, 1998

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 94-1098 L

FILED

DEC 22 1998
US COURT OF
FEDERAL CLAIMS

EASTERN MINERALS
INTERNATIONAL, INC., et al.,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Order, filed December 22, 1998, directing the clerk to vacate the judgment of December 10, 1997,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the Claims of plaintiffs Milton Bernos, Van Buren Minerals, Mary Anne Wyatt, Nancy Wyatt Zorn, and Wilson W. Wyatt, Jr. are dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that Eastern Minerals, shall recover of and from the United States the sum of $9,961,393.00, and Martin P. Duffy, Executor of Wilson W. Wyatt, Sr.'s Estate, and Anne D. Wyatt, shall recover of and from the United States the sum of $3,743,766.00, plus compound interest at the tax overpayment rate.

Margaret M. Earnest
Clerk of Court

December 22, 1998

By: /s/
Deputy Clerk

[***]

Appendix E -- Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445:

30 U.S.C. § 1256. Permits

(a) Requirement; exceptions. No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 503 of this Act [*30 USCS § 1253],* or no later than eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 504 of this Act [*30 USCS § 1254],* no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 502 of this Act [*30 USCS § 1252],* may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this Act [*30 USCS §§ 1201* et seq.], but the initial administrative decision has not been rendered.

[* * *]

(d) Renewal. (1) Any valid permit issued pursuant to this Act shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such renewal shall be issued (provided that on application for renewal the burden shall be on the opponents of renewal), subsequent to fulfillment of the public notice requirements of sections 513 and 514 [*30 USCS §§ 1263* and 1264] unless it is established that and written findings by the regulatory authority are made that--

(A) the terms and conditions of the existing permit are not being satisfactorily met;

(B) the present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this Act and the approved State plan or

Federal program pursuant to this Act; or

(C) the renewal requested substantially jeopardizes the operator's continuing responsibility on existing permit areas;

(D) the operator has not provided evidence that the performance bond in effect for said operation will continue in full force and effect for any renewal requested in such application as well as any additional bond the regulatory authority might require pursuant to section 509 [*30 USCS § 1259]*; or

(E) any additional revised or updated information required by the regulatory authority has not been provided. Prior to the approval of any renewal of permit the regulatory authority shall provide notice to the appropriate public authorities.

(2) If an application for renewal of a valid permit includes a proposal to extend the mining operation beyond the boundaries authorized in the existing permit, the portion of the application for renewal of a valid permit which addresses any new land areas shall be subject to the full standards applicable to new applications under this Act: *Provided, however,* That if the surface coal mining operations authorized by a permit issued pursuant to this Act were not subject to the standards contained in section 510(b)(5)(A) and (B) [*30 USCS § 1260*(b)(5)(A) and (B)] by reason of complying with the proviso of section 510(b)(5) [*30 USCS § 1260*(b)(5)], then the portion of the application for renewal of the permit which addresses any new land areas previously identified in the reclamation plan submitted pursuant to section 508 [*30 USCS § 1258]* shall not be subject to the standards contained in section 510(b)(5)(A) and (B) [*30 USCS § 1260*(b)(5)(A) and (B)].

(3) Any permit renewal shall be for a term not to exceed the period of the original permit established by this Act. Application for permit renewal shall be made at least one hundred and twenty days prior to the expiration of the valid permit.

30 U.S.C. § 1257. Application requirements

[* * *]

(c) Requirements of subsec. (b)(11) and (15) for small operators; costs assumed by regulatory authority. If the regulatory authority finds that the probable total annual production at all locations of a coal surface mining operator will not exceed 100,000 tons, the determination of probably hydrologic consequences required by subsection (b)(11) and the statement of the result of test borings and core samplings required by subsection (b)(15) of this section shall, upon the written request of the operator be performed by a qualified public or private laboratory designated by the regulatory authority and the cost of the preparation of such determination and statement shall be assumed by the regulatory authority.

30 U.S.C. § 1272. Designating areas unsuitable for surface coal mining

[* * *]

(e) Certain Federal, public, and private mining prohibited; notice and hearing. After the enactment of this Act [enacted Aug. 3, 1977] and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act [enacted Aug. 3, 1977] shall be permitted–

[* * *]

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

Appendix F – – Docket Entries, United States Court of Appeals for the Federal Circuit

EASTERN MINERALS V US **99-5054**

CONSOLIDATED W/CROSS APPEAL(S) 99-5059

[* * *]

February 1, 2000	NOTICE OF CALENDARING issued Panel 0003C on March 6, 2000

[* * *]

March 6, 2000	Submitted after ORAL ARGUMENT by Jeffrey C. Dobbins and Raymond D. Battocchi-
99-5050 (KSH)	(NEWMAN, BRYSON and GAJARSA)

[* * *]

Appendix G – – Order, United States Court of Appeals for the Federal Circuit, Dated July 2, 2001

United States Court of Appeals for the Federal Circuit

99-5054, 5059

[CAPTION OMITTED]

ON MOTION

Before NEWMAN, BRYSON, and GAJARSA, Circuit Judges

ORDER

The Unites States moves that the court permit the parties to file a supplemental memoranda regarding the relevance, if any, of the decisions in *Palm Beach Isles Associates v. United States,* 208 F.3d 1374, *on rehearing,* 231 F.3d 1354, *denying rehearing en banc,* 231 F.3d. 1365, and the anticipated decision in *Palazzolo v. Rhode Island,* S. Ct. No. 99-2047, to the issues presented in this case. Eastern Minerals, et al., files an opposition.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion is granted.

(2) The parties are directed to file simultaneously supplemental memoranda of no more than 15 pages on or before July 20, 2001.

FOR THE COURT

JUL – 2 2001
Date

/s/
Jan Horbaly
Clerk

[* * *]

Supreme Court U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01-1100

In the Supreme Court of the United States

EASTERN MINERALS INTERNATIONAL, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Office of Surface Mining Reclamation and Enforcement did not unreasonably delay action in processing petitioners' permit application.

2. Whether, in a regulatory takings case, the holder of a mining leasehold interest may recover compensation for a period after it has voluntarily allowed the lease to expire.

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In the Supreme Court of the United States

No. 01-1100

EASTERN MINERALS INTERNATIONAL, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 271 F.3d 1090. The opinions of the Court of Federal Claims (Pet. App. 16a-31a, 32a-50a) are reported at 36 Fed. Cl. 541 and 39 Fed. Cl. 621.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2001. The petition for a writ of certiorari was filed on January 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, was intended, *inter alia*, to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). To achieve its goals, the Act relies on "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). If a State covered by the Act fails to propose or implement a satisfactory program, the Act requires the Secretary of the Interior to promulgate and implement a federal regulatory program for that State that is designed to meet its particular needs. 30 U.S.C. 1254. Within the federal government, implementation of SMCRA is entrusted to the Office of Surface Mining Reclamation and Enforcement (OSM), an agency located within the Department of the Interior. 30 U.S.C. 1211 (1994 & Supp. V 1999).

Section 506 of SMCRA provides that no person may engage in surface coal mining operations without a permit from the appropriate regulatory authority. 30 U.S.C. 1256. The permitting program requires an applicant to provide detailed information about the possible environmental consequences of the proposed mine, as well as assurances that damage to the site will be substantially repaired after mining has come to an end. See, *e.g.*, 30 U.S.C. 1257, 1260, 1265. An applicant with outstanding environmental violations is barred from receiving a permit until OSM receives assurances that the violations have been cured or that they are

being cured to the satisfaction of the pertinent regulatory agency. 30 U.S.C. 1260(c). In addition, SMCRA completely bars mining within 300 feet of any public park, see 30 U.S.C. 1272(e)(5), as well as in locations beyond 300 feet where the mining activities would adversely affect a public park, unless the agency with jurisdiction over the park approves the mining plan. See 30 U.S.C. 1272(e)(3).

2. The property at issue in this case is adjacent to Fall Creek Falls State Park in southeastern Tennessee, Pet. App. 4a, which was described by a Tennessee official in trial testimony as "probably the focal point of our State Park System," C.A. App. 264. Petitioners Wilson W. Wyatt, Sr., and Anne Wyatt purchased the property in 1953. Pet. App. 16a. They sold the property in 1979 to Cane Co., Ltd. (Cane), but retained a 3.5% royalty interest in the minerals. *Id.* at 4a, 16a-17a. The day following that sale, petitioner Eastern Minerals International, Inc. (EMI), entered into a lease with Cane that allowed EMI to mine coal on the property in question. *Id.* at 4a, 17a; C.A. App. 506-516. The lease ran until February 28, 1991, and allowed EMI to renew for up to four additional ten-year periods, provided it gave Cane 180 days' notice prior to the lease's expiration. Pet. App. 5a, 17a; C.A. App. 512-513. EMI was in financial difficulties for nearly the entire period of the lease: it borrowed a total of $300,000 from Wilson Wyatt, Sr., none of which was ever repaid, and it paid no rent to Cane after early 1980. *Id.* at 113-114.[1]

[1] EMI was also in nearly constant debt to its consultant, MCI Consulting Engineers, Inc. (MCI); on several occasions MCI stopped or threatened to stop work for EMI because of its past due account. See C.A. App. 119, 124, 136, 252, 522-523, 524-525, 527-528, 572-573, 603-604. EMI was also in arrears to other contractors and equipment providers, see, *e.g.*, *id.* at 600, and its insurance was

In 1980, the State of Tennessee issued EMI a one-year permit under its interim regulatory program,[2] giving the company permission to disturb a small portion of the property. Pet. App. 5a, 17a. EMI excavated a box cut at the edge of the property, slightly more than 300 feet from the boundary of the Fall Creek Falls State Park. *Id.* at 5a.[3] On June 18, 1981, four months after the permit expired, EMI applied for and received a second one-year permit from the appropriate state agency. *Ibid.* That permit lapsed as well, and EMI applied for a third permit, this time under the State's newly-approved permanent SMCRA program. *Ibid.* The State rejected that application in 1984 based on EMI's failure adequately to address noise, water quality, and subsidence issues, as well as past violations by EMI's sole shareholder, petitioner Milton Bernos. *Id.* at 5a & n.3.

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canceled for nonpayment of premiums, see *id.* at 137, 607-608. Those significant financial difficulties cast serious doubt on whether EMI could successfully have implemented its mining plan even if an OSM permit had been granted.

[2] During the initial regulatory phase under SMCRA, States could issue surface mining permits, but only in compliance with interim federal standards. Following approval by OSM, States could adopt permanent permitting programs, subject to federal oversight. Pet. App. 3a-4a.

[3] EMI chose that location (which was just outside the 300 foot radius within which mining is absolutely barred, see 30 U.S.C. 1272(e)(5)) even though a consultant recommended that "the present planned location of the box cut entries should be changed to a more central location in relation to the property boundaries and the underlying reserves." C.A. App. 505. The consultant explained that "[n]ot only should operating economics result, but the process of permit granting should be both eased and speeded up." *Ibid.*

3. Later in 1984, OSM revoked Tennessee's regulatory authority under SMCRA and assumed control of the program. Pet. App. 6a. In October 1984, EMI applied to OSM for a five-year permit to extract approximately 4600 acres of coal from the location of the box cut near the state park. *Ibid.*; C.A. App. 557. After EMI corrected certain administrative defects, its application was deemed administratively complete and ready for technical review on March 15, 1985. *Id.* at 560; see Pet. App. 6a. On May 30, 1985, OSM issued EMI a technical deficiency letter (TDL) that outlined various concerns about the possible environmental impacts of the proposed mining activities and requested additional information about those effects. *Id.* at 6a; C.A. App. 577-580. EMI's response "included little of the information requested by OSM." Pet. App. 6a. "On December 12, 1985, OSM issued another TDL requiring specific information to satisfy the hydrologic and environmental impact requirements of the Act." *Ibid.* In response, EMI applied for financial assistance from the Small Operator Assistance Program (SOAP) to perform studies to collect the requested information. *Id.* at 7a-8a, 13a-14a.[4]

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[4] SOAP could not have provided technical assistance with respect to many of the concerns identified in the May 1985 and December 1985 TDLs, including the potential impacts of mining on water quality, hunting and fishing activities, and noise levels in the state park. See 30 U.S.C. 1257(c); 30 C.F.R. Pt. 795; C.A. App. 577-580, 609-615. And the possibility of SOAP funding in no way relieved EMI of the responsibility for demonstrating that the requirements of SMCRA had been met. See 30 U.S.C. 1257(b), 1260(b); C.A. App. 33, 295. At the time of EMI's application, moreover, SOAP funding was available only to operators who intended to mine less than 100,000 tons of coal per year. 30 C.F.R. 795.6 (1987). Although EMI stated in its SOAP application that it intended to mine less than 100,000 tons of coal per year, C.A. App.

In July 1986, OSM denied EMI's permit application, finding that the mine would adversely impact the park by causing excessive noise and possible adverse hydrological consequences. Pet. App. 7a. EMI appealed to an administrative law judge (ALJ), who asked the parties to work together to develop the information needed for OSM's hydrological assessment. *Ibid.* "On February 1, 1988, OSM submitted a revised TDL to EMI outlining the information it still required." *Ibid.* EMI again failed to provide the requested information and instead reapplied for SOAP funding. *Ibid.*

In August 1990, EMI chose not to exercise its option to renew its lease on the property, and the lease expired on February 28, 1991. Pet. App. 7a-8a. EMI nevertheless continued to request issuance of the permit, without informing OSM that it no longer held an interest in the property and therefore had no right to mine the land. See *id.* at 8a, 11a. On April 13, 1994, after continued efforts to obtain information from EMI proved unsuccessful, OSM denied EMI's permit application. *Id.* at 8a.

4. On December 29, 1994, petitioners filed suit in the United States Court of Federal Claims (CFC), alleging that "extraordinary delay" by OSM had caused a permanent taking of petitioners' leasehold interests. Pet. App. 8a. After a trial, the CFC held that petitioners EMI, Wilson W. Wyatt, Sr., and Anne D. Wyatt had suffered a compensable permanent taking. *Id.* at 16a-31a.[5]

617, other documents reflect the company's intent to mine an average of more than 600,000 tons per year, see *id.* at 520, 557.

[5] The CFC dismissed the claims of the other petitioners for various jurisdictional reasons. See Pet. App. 21a-23a.

The CFC stated that "[e]xtraordinary government delay may result in a constructive permit denial," and that a claimant may "satisfy the economic impact prong [of takings analysis] where a delay is truly extraordinary." Pet. App. 26a. The court found that "[t]he Government delayed consideration of [petitioners'] permit application for an extraordinary length of time." *Id.* at 28a. The CFC also held that OSM's delay had interfered with petitioners' reasonable investment-backed expectations because "[e]vidence at trial showed that [petitioners] were not unreasonable in expecting that the subject land contained coal and that coal exploration would be profitable. [Petitioners'] investment in the box cut and other activities with the expectation of gaining profit was reasonable." *Id.* at 29a-30a. The court ultimately awarded $9,961,393 to petitioner EMI and $3,743,766 to the Wyatt petitioners. *Id.* at 51a.

5. The court of appeals reversed. Pet. App. 1a-15a.

a. The court of appeals first held that, even if EMI could establish a valid takings claim, it would be entitled to compensation only for the period before February 28, 1991, the date that it voluntarily allowed its leasehold interest to expire. Pet. App. 9a-11a. As of that date, the court explained, "EMI possessed no valid property interest from which it could assert a takings claim." *Id.* at 10a. The court acknowledged that "the futility exception may sometimes excuse a property owner from submitting multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Ibid.* (internal quotation marks omitted). The court held, however, that "the futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases." *Ibid.* The court concluded:

> If EMI had renewed its lease, it may have been able to assert a permanent taking of its leasehold interest to mine the Cane property. However, we cannot allow the voluntary relinquishment of a property interest to transform a temporary taking into a permanent taking. Moreover, although EMI continued to pursue the permit application, it never informed OSM that it had relinquished its leasehold interest. Had OSM been aware of this fact, it would have been required to deny immediately the permit application because EMI no longer had a right of access to mine the property. For this reason, EMI cannot legally assert a permanent takings claim subsequent to February 28, 1991.

Id. at 10a-11a.

b. With respect to the period before February 28, 1991, the court of appeals stated that in some circumstances "a taking may occur by reason of 'extraordinary delay in governmental decisionmaking.'" Pet. App. 12a (quoting *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 803 (Fed. Cir. 1993)). The court cautioned, however, that "delay is inherent in complex regulatory permitting schemes," *ibid.*, and that "[g]overnmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations," *id.* at 12a-13a. The court also observed that "delay in the permitting process may be attributable to the applicant as well as the government." *Id.* at 13a.

After a detailed review of the interaction between EMI and OSM, Pet. App. 13a-14a, the court of appeals concluded that up to February 28, 1991, "the record does not support a finding that there was 'extra-

ordinary' government delay," *id.* at 14a. The court reiterated that it "must afford OSM significant deference in determining the extent of information necessary for a complete hydrogeologic report." *Id.* at 14a-15a. The court also found that "much of the delay through 1991 was caused by the failure of EMI to respond to OSM's requests for information, and the appellate process before the ALJ," and it observed that "the trial court's finding of bad faith delay on the part of OSM throughout the entire permitting process is inadequately supported." *Id.* at 15a. The court concluded that petitioners had "failed to establish the requisite showing of extraordinary government delay to constitute a temporary taking prior to February 28, 1991. Any finding by the trial court to the contrary is clearly erroneous." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the petition raise any question of widespread or recurring significance. Further review is not warranted.

A. Although the court of appeals recognized that "a taking may occur by reason of extraordinary delay in governmental decisionmaking," Pet. App. 12a (internal quotation marks omitted), it found that petitioners had failed to establish the existence of any extraordinary delay during the period before February 28, 1991, when petitioner EMI voluntarily allowed its leasehold interest to expire. Petitioners contend that the court of appeals, in reaching that conclusion, applied an incorrect standard of review to the CFC's factual findings (Pet. 17-19), and that the court of appeals "has legiti-

mized dilatory tactics" on the part of OSM (Pet. 20). Those claims lack merit.

The court of appeals began its analysis by explaining that "[i]n reviewing the judgments of the [CFC], this court examines findings of fact for clear error and reviews legal conclusions completely and independently. Whether or not a taking has occurred is a question of law based on factual underpinnings." Pet. App. 9a (citations omitted). Petitioners do not and cannot dispute that articulation of the governing standard of review. The court of appeals' disagreement with the CFC centered not on the trial court's findings of historical facts, but on the legal significance of various aspects of the trial record—and, in particular, on the reasonableness of OSM's requests for additional information that the agency deemed relevant in considering EMI's permit application. In any event, the court's ultimate conclusion was that petitioners had "failed to establish the requisite showing of extraordinary government delay to constitute a temporary taking prior to February 28, 1991. *Any finding by the trial court to the contrary is clearly erroneous.*" *Id.* at 15a (emphasis added).

The court of appeals reached that conclusion based on careful examination of the course of dealings between EMI and OSM. See Pet. App. 13a-14a. The court also recognized that "[g]overnmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations," *id.* at 12a-13a—a principle that petitioners do not contest. Petitioners simply challenge the court of appeals' application of settled legal principles to the record in this case. That factbound challenge does not warrant this Court's review.

Petitioners also contend (Pet. 16) that in resolving the question of extraordinary delay, the court of appeals "completely ignored the issue of unfair agency procedures." The court of appeals recognized, however, that "[t]he length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay," and it observed that a reviewing court "must examine the nature of the permitting process as well as the reason for any delay." Pet. App. 12a. Although the court of appeals did not recite the phrase "repetitive or unfair land-use procedures," Pet. 15 (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 620 (2001)), its opinion clearly reflects the court's conclusion that the procedures employed here were reasonable in light of the issues to be resolved and the difficulties in securing EMI's cooperation. See Pet. App. 13a-15a.

Finally, petitioners suggest (Pet. 20) that the eight-year interval between EMI's 1982 permit application and EMI's decision to allow its leasehold interest to expire is sufficient in and of itself to establish that OSM's delay was "extraordinary" and that the agency has employed "dilatory tactics."[6] That argument is

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[6] Petitioners' assertion (Pet. 16-17) that EMI's 1982 application was for a "permit renewal" under 30 U.S.C. 1256 is incorrect. Section 1256(d)(3) provides that "[a]pplication for a permit renewal shall be made at least one hundred and twenty days prior to the expiration of the valid permit." EMI's second one-year permit had already expired on September 13, 1982, when it applied for its third permit on October 10, 1982. C.A. App. 1183. The United States submitted interrogatory responses in this litigation stating that in 1982 petitioner Bernos had applied on behalf of EMI for a "renewal" of the earlier permit. See *id.* at 1425, 1434. Contrary to petitioners' suggestion (Pet. 17 n.9), however, the government's acknowledgment that Bernos had captioned the 1982 application as one for a "renewal" does not constitute a concession by the govern-

without merit. In the first place, EMI's 1982 application was submitted to the state agency that was then responsible for administering the SMCRA program in Tennessee, and that agency denied the application in 1984. Later in 1984, OSM revoked Tennessee's authority to administer SMCRA in the State, and EMI then submitted an application to OSM in October 1984. OSM acted on that application in July 1986, and EMI then appealed to an ALJ. EMI still had not, however, submitted all of the relevant data, and the ALJ oversaw an arrangement to address that problem. See pp. 4-6, *supra*. Those affirmative steps to address defects in EMI's submissions do not constitute unreasonable delay.

In any event, nothing in this Court's decisions suggests that delay of a particular duration effects a taking per se, without regard to the complexity of the permitting agency's task and the degree to which the applicant itself contributes to the delay. Cf. *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring) ("The temptation [in takings cases] to adopt what amount to *per se* rules in either direction must be resisted."). Such a rule is unsupported by precedent and would create perverse incentives for permit applicants to prolong land-use agencies' decisionmaking processes (*e.g.*, by responding to requests for necessary information in a dilatory or incomplete manner) in order to subject the government to takings liability.

B. Neither of the final agency actions regarding the propriety of mining on the subject property—*i.e.*, OSM's initial denial of EM's permit application in 1986 and the subsequent denial in 1994—could have provided

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ment that the application was in fact for a "permit renewal" within the meaning of Section 1256.

the basis for petitioners' taking claims. Petitioners' suit was filed more than six years after the 1986 permit denial, and any claim based on that agency action would have been barred by the applicable statute of limitations. See 28 U.S.C. 2501. Petitioners could not have asserted a takings claim based on the 1994 permit denial because petitioner EMI no longer held an interest in the property at that time, see Pet. App. 7a-8a, and the claims of the other petitioners are derivative of EMI's, see note 7, *infra*. Petitioners were therefore forced to rely on a theory of "extraordinary delay." Petitioners contend (Pet. 13-14) that OSM had reached a definite decision not to grant a permit, and that their pending application had therefore become futile, before their right to renew the lease expired. But while the CFC appeared to adopt that view, see Pet. App. 28a, 36a-37a, the court of appeals held that "the trial court's finding of bad faith delay on the part of OSM throughout the entire permitting process is inadequately supported." *Id.* at 15a.

In Part III.A. of its opinion, the court of appeals held that any taking EMI might have suffered would have been temporary rather than permanent in character. Pet. App. 9a-11a. The court explained that "EMI voluntarily chose not to renew its leasehold interest in August of 1990. Thus, as of February 28, 1991, EMI possessed no valid property interest from which it could assert a takings claim." *Id.* at 10a. The court concluded that it "[could not] allow the voluntary relinquishment of a property interest to transform a temporary taking into a permanent taking." *Ibid.* Relying principally on *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946), petitioners contend that "if there was a taking of [EMI's] Leasehold interest by August 31, 1990, [EMI] was entitled to compensation for its remaining lease

term *and the right to renew*." Pet. 12 (emphasis added). That argument is misconceived.

In *Petty Motor Co.*, the government exercised its power of eminent domain in November 1942 to oust a private tenant in order to allow the government to occupy and use real property for its own purposes. 327 U.S. at 374. At that time, "[t]he Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year." *Id.* at 375. The Court held that in computing the just compensation owed to the tenant, "[t]he value of the remainder of the term of the [tenant's] lease includes the value of the right to a renewal for a year, if such right continues under Utah law, as well as the value of the period ending October 31, 1943." *Id.* at 380-381. In the present case, however, the expiration of EMI's lease resulted not from a government condemnation action, but from EMI's *voluntary* relinquishment of its interest in the property. Petitioners cite no case that has applied *Petty Motor Co.* to award compensation for restrictions on the use of property that the claimant has voluntarily abandoned.

In any event, Part III.A. of the court of appeals' opinion (Pet. App. 9a-11a) is not essential to the court's disposition of the case. The determination whether EMI's voluntary relinquishment of its leasehold interest bars petitioners from establishing a permanent taking would be relevant only in determining the *amount* of compensation to which petitioners would be entitled *if* they could prove that a compensable taking occurred before the lease expired. Under any plausible theory of the case, EMI must prove that a taking occurred while the lease was in effect in order to obtain a just compensation award. Petitioners do not contest that proposition; they simply assert that "*if there was a*

taking of [EMI's] Leasehold interest by August 31, 1990, [EMI] was entitled to compensation for its remaining lease term and the right to renew." Pet. 12 (emphasis added).[7] Because the court of appeals correctly held that petitioners had not established that a taking occurred before February 28, 1991, and because that holding raises no legal issue of general importance warranting this Court's review, the court of appeals' conclusion that petitioners would not in any event be entitled to compensation beyond that date has no practical effect on the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2002

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[7] Petitioners contend that the court of appeals failed adequately to explain its determination that the claims of the Wyatt petitioners should be dismissed, and they suggest that some of those petitioners could obtain compensation as a result of the final denial of EMI's permit application in 1994. See Pet. 14-15. The property that the Wyatt petitioners allege was taken, however, consisted entirely of their share of the royalties that might have been earned if EMI had been permitted to mine the land. The Wyatt petitioners' takings claims are therefore wholly derivative of EMI's and fail for the reasons stated in the court of appeals' opinion.

Supreme Court, U.S.
FILED
APR 25 2002
CLERK

No. 01-1100

IN THE

Supreme Court of the United States

EASTERN MINERALS INTERNATIONAL, INC., ET AL.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Each of the four questions stated in the petition (Pet. (i)) is properly presented for review.

Question 1. The Court of Appeals' first ruling (Pet. App. 9a-11a) was that, although Eastern Minerals International, Inc. ("Eastern") proved that seeking a permit became futile before its right to renew its lease expired on August 31, 1990, Eastern could not recover for a permanent taking because it voluntarily permitted its lease to end on February 28, 1991. Respondent argues (Br. Opp. 14-15) that the Federal Circuit's primary ruling was unnecessary to its decision. That unusual argument does expose the untenable nature of the result reached by the Federal Circuit. However, respondent is incorrect. This ruling was essential to the judgment below.

The Trial Court made findings that Eastern's permit application became futile in early August 1990, before the right to renew expired (Pet. App. 34a-38a). Applying the rulings in decisions of this court to these findings, a permanent taking of Eastern's leasehold interest (including the right to renew) occurred, and Eastern's claim for that taking ripened, in early August 1990. The Court of Appeals did not reverse these findings. Indeed, it acknowledged them by noting (Pet. App. 8a) that OSM had determined that mining anywhere on the land of Cane Tennessee, Inc. ("Cane"), the lessor, would "adversely affect" the Park.

The Court of Appeals nevertheless ruled as a matter of law (Pet. App. 10a) that Eastern could not recover for a permanent taking, despite proving that seeking a permit had become futile before the right to renew the lease expired. Absent that ruling, the United States would have been liable for a permanent taking, as the Trial Court had held, and it would have been unnecessary for the Federal Circuit to go on to address the question of extraordinary delay. Thus, contrary to the government's view (Br. Opp. 14-15), the Federal Circuit's primary ruling was essential to the disposition of the case, and it goes to liability, not measure of damages.[1]

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[1] The Federal Circuit's property interest and futility ruling was wrong on the facts as well as the law, because Eastern remained in possession as a holdover tenant, with Cane's consent, until 1993 (JA 84 (Tr. 496-98)).

Question 2. Whether Wilson W. Wyatt, Sr. and Anne D. Wyatt ("Wyatts"), or the Wyatt children, can recover for a permanent taking is properly presented for the reasons just stated.

Further, this case presents the question whether the Wyatts or their children can recover based on OSM's 1994 permit denial. The United States acknowledges (Br. Opp. 12-13) that OSM's 1994 written permit denial was a final agency action precluding mining on the property. Contrary to the government's argument (Br. Opp. 13, 15 n. 7), however, the claims of the Wyatts or their children are not "wholly derivative" of Eastern's. The Court of Appeals made no such ruling, and for good reason. The 3.5% royalty is not tied to Eastern's lease in any way. *See* Pet. App. 17a. The royalty is payable when any person mines and removes coal from the property.[2] Once OSM determined that no mining could take place on the property – – which even on the Government's theory occurred upon the 1994 final decision – – the Wyatts or their children had a ripe takings claim, *Palazzolo v. Rhode Island,* 533 U.S. 606, 619-621 (2001) (no need to pursue permit if allowable uses of property are known), and they were entitled to compensation for the fair market value of their royalty interest at the time of the taking.

Question 3. The Trial Court found, *inter alia,* that OSM never would have granted a permit, and adopted the policy of stopping Eastern's development without taking a final action Eastern could appeal, while waging a war of attrition against Eastern (Pet. App., 34a, 36a). Petitioners argued (Pet. 15-17) that

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[2] The 3.5% royalty was reserved in a February 15, 1979 deed in which the Wyatts conveyed their property to Cane. The deed states that the Wyatts "reserve unto themselves . . . a royalty interest in the coal in, on, and underlying the property conveyed equal to three and one-half (3-1/2%) per cent of the gross sales price of all coal mined and removed from the foregoing property by whatever mining or removal method." D. Ex. 68, p. 6, received in evidence, Tr. 1142. That royalty was thus payable whether Cane, Eastern, or any other person mined and removed the coal.

the Federal Circuit circumvented several decisions of this Court[3] by completely disregarding the Trial Court's findings of repetitive and unfair procedures, while reversing its judgment which was based in part on those findings. Respondent seems to argue (Br. Opp. 11) that the Federal Circuit did address the Trial Court's findings on this issue, and that it ruled that the procedures OSM used were reasonable in the circumstances. The Federal Circuit's opinion does not support such an argument. However, whether the Federal Circuit disregarded this court's repetitive and unfair procedures standard, or instead undercut it by impliedly reversing the Trial Court's unfairness findings, this case presents the question whether petitioners can recover because the agency used unfair and protracted procedures to avoid a final decision, including failing to issue in writing a decision it reached to deny a permit.

Question 4. In the Court of Appeals' view (Pet. App. 11a, n. 6), it was appropriate to rule on the issue of extraordinary delay because, although Eastern could not recover for a permanent taking, it might recover for a temporary taking of its leasehold interest existing from the end of August 1990 through February 1991. The Federal Circuit stated that: in conducting this review, it "examines findings of fact for clear error and reviews legal conclusions completely and independently. . . . Whether or not a taking has occurred is a question of law based on factual underpinnings." (Pet. App. 9a).

Contrary to the government's view (Br. Opp. 10), petitioners do dispute that articulation of the proper standard of review. That articulated standard is based on Federal Circuit decisions, not decisions of this Court. The Federal Circuit's application of that standard of review to support its ruling that the Trial Court's findings of extraordinary delay were clearly erroneous is plainly at odds with decisions of this Court addressing the deference to be given trial court findings in a

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[3] *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 350, n. 7 (1986); *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 698 (1999); and *Palazzolo, supra,* 533 U.S. at 621.

takings case.[4] Thus the question as to what standard of review properly applies in takings cases is presented here.

* * * * *

The government does not dispute that the takings involved here were categorical, and that Eastern detrimentally relied upon two validly issued permits. The Federal Circuit reversed the judgments for Eastern and the Wyatts despite these considerations, and the Trial Court's extensive findings of futility and intentional delay.

Certiorari should be granted.

Respectfully submitted,

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[4] *Monterey, supra,* 526 U.S. at 720, citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992), quoting *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).